Supreme Court, U.S.
FILED

03 317 AUG 26 2003

No. _____

In the Supreme Court of the United States

VIDTAPE, INC., a corporation; INVENTIVE TECHNOLOGY SYSTEMS, INC., a corporation; MOHINDER SINGH ANAND, individually and as President of Vidtape, Inc.; ARJAN SIGN ANAND, individually and as an officer of Vidtape, Inc.; SATINDER DINGH ANAND, individually and as an employee of Vidtape, Inc., and as President of Inventive Technology Systems, Inc.,
Petitioners,

v.

ELAINE L. CHAO, Secretary of Labor,
United States Department of Labor,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ALAN E. WOLIN
Counsel of Record
WOLIN & WOLIN
420 JERICHO TURNPIKE, SUITE 215
JERICHO, NY 11753
(516) 938-1199
Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

QUESTIONS PRESENTED

1. The Finding of the Courts below, That Satinder Singh Anand Was an "Employer", Was Inconsistent with Decisions of this Court and of the United States Court of Appeals for the Second Circuit.

2. The Finding of the Courts Below, That the Department of Labor Was Entitled to Back Wages for Malkit Singh Was Inconsistent with Decisions of this Court and of the United States Court of Appeals for the Second Circuit.

3. The Finding of the Courts below, That Petitioners Violated the Minimum Wage and Overtime Provisions of the Fair Labor Standards Act, Is Inconsistent with the Standards Set by this Court and of Other United States Courts of Appeal.

4. The Finding of the Courts below, That the Department of Labor Produced Evidence of Damages, Was Inconsistent with Decisions of this Court and of Other United States Courts of Appeal.

LIST OF PARTIES

Petitioner

Petitioners Vidtape, Inc. and Inventive Technology Systems, Inc., are domestic corporations. Petitioner Mohinder Singh Anand is the President of Vidtape, Inc.. Petitioner Satinder Singh Anand is the President of Inventive Technology Systems, Inc..

Respondent

The Respondent is Elaine L. Chao, Secretary of Labor, United States Department of Labor.

TABLE OF CONTENTS

Questions Presented i

List of Parties ii

Table of Contents iii

Table of Cited Authorities v

Opinions Below 1

Jurisdiction 1

Statutory Provision Involved 1

Statement of the Case 1

A. Relevant Facts 1

B. Proceedings Below 14

Reasons for Granting the Writ 16

1. The Finding of the Courts Below, That Satinder Singh Anand Was an "Employer", Was Inconsistent with Decisions of this Court and of the United States Court of Appeals for the Second Circuit 16

2. The Finding of the Courts Below, That the Department of Labor Was Entitled to Back Wages for Malkit Singh Was Inconsistent with Decisions of this Court and of the United States Court of Appeals for the Second Circuit 19

3. The Finding of the Courts below, That Petitioners Violated the Minimum Wage and Overtime Provisions of the Fair Labor Standards Act, Is Inconsistent with the Standards Set by this Court and of Other United States Courts of Appeal . . . 24

4. The Finding of the Courts below, That the Department of Labor Produced Evidence of Damages, Was Inconsistent with Decisions of this Court and of Other United States Courts of Appeal 26

Conclusion 30

Appendix

Appendix A
Summary Order of the United States Court of Appeals for the Second Circuit dated May 27, 2003 . . . . . 1a

Appendix B
Amended Memorandum Opinion, Order and Judgment dated April 22, 2002 . . . . . 11a

Appendix C
Memorandum, Opinion, Order and Judgment dated March 29, 2002 . . . . . 55a

Appendix D
Statutory Provisions Involved 98a

TABLE OF CITED AUTHORITIES

CASES

Anderson v. Mt. Clemens Pottery Co.,
328 U.S. 680 (1946) 24, 25, 26

Carter v. Duchess Community College,
735 F.2d 8 (2d Cir. 1984) 18

Goldberg v. Whitaker House Corp.,
366 U.S. 28 (1961) 18

Herman v. RSR Security Services, Ltd.,
172 F.3d 132 (2d Cir. 1999) 18

Reich v. Gateway Press, Inc.,
13 F.3d 685 (3rd Cir. 1994) 20

Reich v. Southern Maryland Hospital, Inc.,
43 F.3d 949 (4th Cir. 1995) 20

Reich v. Southern New England Telecomm Corp.,
121 F.3d 58 (2d Cir. 1997) 19, 23

Secretary of Labor v. De Sisto,
929 F.2d 789 (1st Cir. 1991) 20

STATUTES, REGULATIONS, AND RULES

29 U.S.C. §201 *et seq* 1, 4, 14

29 U.S.C. §203(a)(1) 23

29 C.F.R. Part 541.1 . . . . . 1, 23, 24

Petitioners respectfully petition for a writ of certiorari to review the Summary Order of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Bench Decision of the United States District Court for the Eastern District of New York is unreported and is reproduced in the Appendix. The Summary Order of the United States Court of Appeals for the Second Circuit is unreported and is reproduced in the Appendix.

JURISDICTION

The Summary Order of the United States Court of Appeals for the Second Circuit was rendered on May 29, 2003. No rehearing was requested.

STATUTORY PROVISIONS INVOLVED

The provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* and 29 C.F.R. Part 541.1, relevant to this petition are reprinted in the Appendix at 98a-100a.

STATEMENT OF THE CASE

A. Relevant Facts

The Department of Labor instituted this lawsuit alleging that the various Petitioners violated sections of the Fair Labor Standards Act (FLSA) pertaining to minimum wage and overtime payments. There were also allegations that the Petitioners illegally employed an underage employee and failed to keep proper payroll records. The Department of Labor requested an injunction permanently restraining the Petitioners from any further violations of the FLSA as well as

a monetary judgment for unpaid minimum wages, unpaid overtime wages and liquidated damages.

Petitioner Vidtape is a New York corporation which was incorporated in January, 1988. Prior to April 30, 1998, Vidtape was engaged in the manufacture, duplication, marketing, sale and distribution of video tapes. The sole shareholder and officer of Vidtape from its inception was Mohinder Singh Anand. He is also the only person who is responsible for making decisions concerning the hiring and firing of employees for Vidtape as well as establishing the hours of employment and salary structure for Vidtape.

Petitioner Inventive was incorporated in the State of Delaware on June 18, 1997. The sole corporate officer of Inventive since its inception has been Satinder Singh Anand. He is also the individual who is responsible for controlling and regulating the salary, hours and duties of the employees.

The stock of Inventive is owned by a Trust known as Nihang Nivas. The grantor of the Trust is Mohinder Singh Anand. The Trustee is Arjan Singh Anand. The beneficiaries of the Trust are family members of Mohinder Singh Anand. On or about February 1, 1998, Vidtape and Inventive entered into a Buy and Sell Agreement whereby the production aspects of Vidtape were sold to Inventive. The terms of the sale were fully documented.

The consideration for the transaction was well-documented. The book value of the various assets sold to Inventive had been established at $125,000.00. In order to culminate the transaction, Inventive assumed outstanding loans from Key Bank which were previously the responsibility of Vidtape. These loans totalled $175,000.00.

Prior to his involvement with Inventive, Satinder Singh Anand, who is the brother of Mohinder Singh Anand, was

employed as a salesman for Vidtape. He never partook in any business related policy decisions for Vidtape. As a result, he had no input into the hiring and firing of employees nor did he establish salaries or work schedules.

Mohinder Singh Anand had undertaken to delegate supervisory powers over Vidtape's employees to a foreman. Initially, that person was Malkit Singh. Eventually, Angus Gayle took over that responsibility. Malkit Singh was paid on a monthly basis. His paychecks indicate that he received anywhere from $1,400.00 to $1,950.00 per month, after taxes. The first check issued to Malkit Singh, which was for a partial work period, was in the amount of $1,068.10.

Malkit Singh actually partook in the hiring procedure for Vidtape. He also was involved in the setting or work schedules as all as setting of rates of pay for the employees.

On or about May 1, 1998, Inventive commenced doing business in the production of video tapes. Immediately prior to that date, Inventive made a business decision to employ employees of Vidtape who had prior experience in the area of production.

In furtherance of this, on April 30, 1998, various employees of Vidtape signed a document indicating that they were resigning as an employee of Vidtape as of April 30, 1998. The document which was introduced as Exhibit G during the trial, stated "I further acknowledge that during the course of my employment with Vidtape, Inc., I have no claims for paid due wages, or anything else. My period of employment with Vidtape Inc. has been satisfactory."

Since May 1, 1998, Inventive has been the employer of the individuals in the production phase of the business and has undertaken to perform all duties and responsibilities incumbent in the production of the video tapes. Vidtape, on

the other hand, only operates as a distributor of video tapes. As a result, it employs only secretarial and sales people. Since May 1, 1998, Vidtape and Inventive have engaged in a business relationship in which Vidtape purchases video tapes which it ultimately distributes. Despite this fact, Vidtape is not the sole customer for Inventive. Mohinder Singh Anand's only role with Inventive's employees is to periodically instruct the production supervisor of Inventive as to the proper prioritization of production so that customer's orders of Vidtape can adequately be satisfied. This is done only when Satinder Singh Anand is unavailable.

In an effort to prove that the Petitioners had violated the FLSA of 1938, as amended, 29 U.S.C. §201 *et seq.*, in that they paid improper minimum wage and overtime pay, the Department of Labor, at trial, produced the testimony of a number of employees of Vidtape. The testimony of these employees was apparently also used as the underlying basis to calculate alleged monetary damages.

Wahida Akhter, who worked for Vidtape in 1996 stated she was paid $4 per hour. Despite this fact, her paychecks indicated she was paid in excess of this amount. She also signed a document with the DOL indicating she never worked on Sundays.

Akhtar Majeed Khan, who worked from July 21, 1996 to November 4, 1996, testified he was paid $8 per hour and never worked on Sundays. Despite this, the DOL "calculated he was paid less than minimum wage."

Wilbur Amaya testified he was paid $4 per hour when he commenced employment. He was told he received $5.15 per hour and testified that he never worked on Sundays.

Francisca Euseda testified she worked every other Sunday from 8:30 a.m. to 1:00 p.m.. She indicated that she

complained because her pay was only $4.50 per hour. This was in conformity with the proper minimum wage at the time.

Marta Argueta testified that she gave a statement to the DOL in which she indicated she never worked on Sundays. This was in conformity with the testimony of Ms. Gurmito, Kulwinder Kaur and Jatinder Kaur, who also never worked on Sundays.

Baldev Singh testified he commenced working for Vidtape in 1995. He admitted that he told counsel for the DOL, Evan Barough, Esq., in a prior interview that he "never worked on Sundays."

Sukwinder Kaur commenced employment with Vidtape in July, 1994. She stopped on February 20, 1997. Although she worked with her sister, Sarabjit Kaur and friend, Rajesh Kumari, her testimony had glaring inconsistencies. She swore that she consistently worked on Sundays and that her sister worked with her. She also indicated that no one at Vidtape who worked on Saturdays or Sundays punched in the time clock. This was contrary to the testimony of all of the witnesses produced by the Department of Labor. In describing her wages, she indicated she was paid $3.50 per hour and then received an increase to $4.25 per hour in 1996.

Sarabjit Kaur gave a statement to a Department of Labor investigator. In that statement, she indicated that she did not work on Saturdays and that she was paid time and one-half for overtime. She recanted these statements during her testimony.

She indicated that she had checked her paychecks and if there was an error, it was corrected. She was satisfied she was paid according to her records. She testified that in October, 1996, she received a raise to $4.75 per hour. In

June, 1997, her schedule was changed to 8:30 a.m. to 5:00 p.m., 5 days per week. On April 17, 1998, she gave a statement to the Department of Labor at her home. In this statement, she said she got paid cash for overtime work. She acknowledged getting paid minimum wage and confirmed that she was receiving $4.75 per hour and then received an increase to $5.15 per hour. At the time of her deposition on December 21, 2000, she testified that she clocked in on weekends. However, at trial, she changed her testimony to indicate that she did not punch in on weekends.

Rajesh Kumari indicated that she commenced employment with Vidtape in November, 1995 and continued with Inventive until December 6, 1998. Ms. Kumari testified that she worked 2 to 3 Sundays per month. This was in direct contradiction to the testimony of her friend, Sukwinder Kaur, who testified that Ms. Kumari took Sundays off.

Ms. Kumari, at trial, recanted a prior statement she gave to the Department of Labor in which she indicated that she worked only some Saturdays and that when she commenced employment she was paid at the rate of $4.25 per hour which was increased to $4.75 per hour in October, 1996. Ms. Kumari also contradicted her testimony when she stated that on June 27, 1997 she was working 8:30 a.m. to 7:00 p.m.. This was belied by her statement to the Department of Labor on June 27, 1997 at which time she indicated she was working 8:30 a.m. to 5:00 p.m. and her time cards for the relevant period which indicated hours of 8:30 a.m. to 5:00 p.m..

Ms. Kumari also acknowledged being present and affirming a statement made by Sarabjit Kaur on April 14, 1998 to the Department of Labor. Although the statement was given at the house of Sarabjit Kaur, Ms. Kumari indicated

that it was not truthful because she was afraid of the Petitioners.

In this document, Ms. Kumari admitted receiving $4.25 per hour in 1996 and receiving an increase to $4.75 per hour in September. She also admitted receiving time and a half for work on Sundays.

The final employee to testify for the plaintiff was Alcides Flores. He indicated he sometimes worked on Sundays. When he did, he always punched in. He did not recall his pay, but does remember being told at the time he was hired that he would make $4.75 per hour. He also recalled getting a raise to $5.15 per hour when the minimum wage was increased. Mr. Flores testified that he believed he was receiving the proper minimum wage pay. Moreover, he admitted never mentioning that he worked on Sundays when he was questioned about his work schedule during an interview with the Department of Labor on April 6, 1998.

The Department of Labor, in order to establish damages, called as a witness, provided the testimony of John Bialt, an employee of the Wage and Hour Division of the Department of Labor. Mr. Bialt created a schedule of damages.

Mr. Bialt's calculations were based upon assumptions that were faulty and irrational and served the purpose of inflating damages. Despite the fact that the Government's witnesses, time and time again, contradicted themselves and each other, Mr. Bialt used as his guideline the fact that each employee was paid at the rate of $4 per hour and working two Sundays per month. This ignored the fact that most employees testified that they did not work on Sundays. Furthermore, many witnesses testified that, although they were not aware of what the minimum wage was, they believed that their net pay, after taxes, was approximately $4 per hour, which means that they were receiving proper minimum wage which

amounted to more than $4 per hour and received increases when the minimum wage was increased. Moreover, many of the employees who testified they were receiving $4 per hour had their testimony contradicted when faced with their paychecks which indicated they received far more compensation than they testified to.

As a result, Mr. Bialt's calculations accepted the worst possible scenario and could only conclude that extensive back wages were owed. Based upon a 60 hour work week and the prevailing wage rate, a review of payroll checks during any period will confirm that employees were paid at a rate greater than $297.50 or $332.50 or $360.50 during the prevailing minimum wage period.

Despite the foregoing, Mr. Bialt testified that he determined that the employees rate of pay was $4 per hour based on statements made to the Department of Labor and review of depositions. This assumption automatically presupposes a violation of the minimum wage law and is contrary to the testimony of most of the Government's witnesses. Using the rate of pay of $4 per hour, Mr. Bialt then referred to the gross pay of the employees to determine the amount of hours worked. Naturally, since the assumption of $4 per hour was used, his figures would always show additional money was due.

Mr. Bialt also assumed in calculating overtime that each employee worked two Sundays per month. Since this is automatic overtime hours, it is obvious that money would have to be due and owing the employees. This assumption was also contrary to the testimony of most of the employees who denied working on Sundays.

Mr. Bialt admitted that in his calculations he ignored payroll records supplied by Vidtape, which indicate the amount of hours worked per paycheck. These records

provide worked hours information which would have been more accurate than Mr. Bialt's mere assumptions.

The unreliability of Mr. Bialt's calculations were further shown by his own testimony which indicated that based upon the trial testimony of certain employees, he would have to make adjustments to his calculations.

Mr. Bialt further admitted that he never saw the time cards for Vidtape which were provided to the Department of Labor and which were exhibits during the trial. As a result, the time cards were not referred to in calculating the propriety of the wages.

The inaccuracy of Mr. Bialt's calculations were magnified by certain records. For example, Mr. Bialt's calculations for an employee named Punian Akwal indicated he worked about 74 hours per week, excluding Sundays, and 86 hours if Sunday was included. In fact, Mr. Bialt's calculations indicate that Mr. Akwal had months in which he worked 431 hours; 427 hours; 445 hours and 453 hours. The worst case scenario would indicate that employees worked 60 hours per week plus 5 hours for Sunday. This equals approximately 280 hours per month. This exceeds the testimony of all witnesses who testified as to their weekly schedule.

Mr. Bialt also admitted that he continued to calculate at $4 per hour even after the rate of pay was admittedly increased to $4.75 per hour.

In continuing with the calculations for Punian Akwal, Mr. Bialt admitted that for another week, his calculations would show 85.98 hours for a 6 day week and additional time for two Sundays per month. Mr. Bialt went as far as to state that he felt his formula and assumptions were better than actually referring to the time cards which categorically reflected the hours worked.

The unreliability of Mr. Bialt's calculations can best be shown by his determination concerning Walter Aguirre. Mr. Aguirre worked for Vidtape during one period that time cards were in existence and the work schedule was 5 days per week, 8 hours per day. Yet, Mr. Bialt calculated money due to Mr. Aguirre even for that period.

Mr. Bialt's calculations also indicated that an employee named Luis Garcia worked 75 hours per week, excluding Sundays, and that Kashmir Kaur worked 72.65 hours per week, excluding Sundays. In calculating the hours of Alcides Flores, who testified at trial, Mr. Bialt calculated Mr. Flores worked 68.769 hours per week. This was more than the work schedule testified to by Mr. Flores.

Employees of Vidtape who testified on its behalf countered the arguments of the Department of Labor.

Hardeep Anand, the bookkeeper for Vidtape, indicated that she worked for Vidtape from 1994 to 1998. She was the only bookkeeper in the office. No one else did the same work as she.

Ms. Anand was responsible for figuring out Vidtape's payroll and writing the checks. She indicated that she calculated the time cards, which reflected fifteen days. She then counted the hours for each work week, which ran from Monday to Sunday.

Ms. Anand was aware that the minimum wage in 1994 was $4.25 per hour and that it increased to $4.75 per hour in August or September, 1996 and then to $5.15 per hour in August or September, 1997. She always used the prevailing minimum wage when calculating pay. Ms. Anand testified that any hours above 40 were calculated at time and a half. She was responsible for figuring out taxes and deductions.

The employees were paid twice per month. She prepared the checks and Mohinder Singh Anand signed them.

Ms. Anand distributed the checks to the employees. After a two week period, the cards were discarded.

Ms. Anand also testified that she never worked on Sunday and was not aware of anyone ever working on Sunday. She also wrote the paycheck to herself using the same system.

Ms. Anand also indicated that Mohinder was the only owner of Vidtape. Satinder Singh Anand was merely a salesperson.

Vidtape produced various employees who testified that they never worked on Sundays and were always paid properly, including time and a half for overtime.

Satinder Singh Anand testified that he was employed as a salesman for Vidtape. He indicated that he had no ownership interest in the business nor was he an officer of the corporation. He was not involved in the hiring or firing of employees nor did he set work schedules or rates of pay.

As a salesman for Vidtape, Satinder Singh Anand occasionally instructed the production workers concerning the prioritization of work so that certain orders could be met. In discussing the work schedule and rate of pay for Inventive, Satinder Singh Anand indicated that the hours were 8:30 a.m. to 5:00 p.m., 5 days per week. The employees received $5.15 per hour and upwards. If an employee worked over 40 hours, he received time and a half. Satinder Singh Anand also indicated that Inventive, as did Vidtape, had different employee classifications, including packaging, duplication and blank tape area.

Inventive's pay schedule was one time per month. The work week for tabulation of hours was Monday to Sunday.

Furthermore, the employees received an advance on their salaries in the middle of the month.

Mohinder Singh Anand described that Vidtape employed different classifications of employees, including video duplicators, warehouse personnel, sorting and video loading. Mohinder Singh Anand also indicated that Hardeep Anand worked as a secretary and bookkeeper in the office. She was responsible for processing the payroll and keeping books. The corporation also employed a Warehouse Manager. Originally the Manager was Malkit Singh. He left in July, 1997 and was replaced by Dilbag Singh and Pritam Singh. At that time, the corporation also employed Angus Gayle as Production Supervisor.

The duties of Malkit Singh, as Warehouse Manager, varied from those of the other employees. Moreover, he was paid on a different scale than other employees. His pay was approximately $1,800 per month, gross.

Mohinder Singh Anand testified that all employees were notified of their rate of pay and hours of employment before being hired. The regular hours worked by employees were Monday to Friday, 8:30 a.m. to 7:00 p.m.. If needed, employees were requested to work on Saturdays. This occurred approximately one to two times per month and included 20 to 30% of the work force. Vidtape was never open on Sundays. In June, 1997, the hours for Vidtape were changed to 8:30 a.m. to 5:00 p.m., Monday through Friday. Saturdays remained on an as needed basis.

The responsibility for payroll rested with Hardeep Anand. She was responsible for calculating hours worked and deducting taxes. Vidtape employed the use of time cards which was located on a ledge between the office entrance and the door entrance. All employees were required to punch in

and out. Hardeep then calculated the hours worked based upon the time cards.

During the period of time in issue, Vidtape used the services of an accountant named Irving Shapiro. Mr. Shapiro's original task was to file tax returns. He then began to come to Vidtape on a quarterly basis to prepare the quarterly returns. Mr. Shapiro told Mohinder Singh Anand to keep a ledger for the employees which contained such information as the paycheck number, amount of the check, gross and net salaries.

Despite the fact that Vidtape employed time cards, they were not preserved after payroll was made. Mohinder Singh Anand testified that he was not aware of the requirement to preserve the time cards nor was he informed by Mr. Shapiro. Mohinder Singh Anand indicated that it was the responsibility of Ms. Anand to calculate the hours from the time cards. Ms. Anand used the cards as the basis to write payroll checks. She then gave the checks to Mohinder Singh Anand for signature.

Mohinder Singh Anand identified various Vidtape time cards that were introduced into evidence. He described how the time card reflected a fifteen calendar day period. He further described how the cards reflected the hours worked as well as the days worked. The time cards also indicated the employees, at times, did not work a steady shift, but rather may have worked abbreviated hours.

Satinder Singh Anand also described how an employee would be paid overtime in the sum of time and a half if his work week exceeded 40 hours.

After having examined the calculations of the Department of Labor, Mohinder Singh Anand indicated that he was in total disagreement with them. He prepared his own

calculations recognizing that the time cards reflected the number of hours worked for each week of work and that any hours in excess of 40 would necessitate time and a half.

In preparing his calculations, Mohinder Singh Anand used the checks issued to each employee for wages. He compared these checks with the ledgers reflecting the employee's gross pay. He then worked off a calendar to break down the work week. With this information, he calculated the sum of an employee's monthly paychecks, taking into account the wage scale of the employee, the hours worked and overtime payments. Recognizing these factors and further recognizing that employees did not work on Sundays, Mohinder Singh Anand concluded that all employees were paid properly.

In fact, in reviewing these charts, which pertained to pay during the period in which time cards were preserved, it confirmed that all employees were paid properly.

B. Proceedings Below

This action was brought by the Secretary of Labor against the various corporate and individual Petitioners alleging that the Petitioners violated various sections of the FLSA, 29 U.S.C. §201 *et seq.*. Among the violations alleged were: (1) failure to pay minimum wages; (2) failure to pay overtime wages; (3) employment of a child; (4) violation of the "hot goods" provision of the Act by putting into the stream of commerce goods produced in violations of the FLSA; and (5) violation of the FLSA's record-keeping provisions. The Secretary sought injunctive relief to enjoin these violations, as well as back-pay, liquidated damages, and costs on behalf of 67 employees.

A bench trial was held before the Honorable E. Thomas Boyle, United States Magistrate Judge, on April 23, 24, 25, 26, 27, 30 and May 1, 2001.

Post-trial memoranda were submitted to the court and orally argued on October 18, 2001. Subsequent thereto, on March 29, 2002, the court rendered a Memorandum, Opinion, Order and Judgment. This was amended by an Amended Memorandum, Opinion, Order and Judgment dated April 22, 2002.

The court's Memorandum, Opinion, Order and Judgment made the following determinations in favor of plaintiff and against Petitioners:

(1) Mohinder Singh Anand and Satinder Singh Anand were employers under the FLSA;

(2) Vidtape and Inventive were an "enterprise" under the FLSA;

(3) Petitioners violated the record keeping provisions of the FLSA;

(4) Petitioners violated the minimum wage provision of the FLSA;

(5) Petitioners violated the overtime provisions of the FLSA;

(6) Petitioners violated the child labor provisions of the FLSA; and

(7) Petitioners acted willfully in violating the FLSA.

The court then ordered that the Petitioners were permanently enjoined from violating the provisions of the Act; that Vidtape, Inventive, Mohinder Singh Anand and Satinder Singh Anand pay to plaintiff, as unpaid minimum wage and overtime, the sum of $119,853.58 as well as $119,853.50 in liquidated damages.

Believing that the Memorandum, Opinion, Order and Judgments were incorrect, both as to issues of law and fact, Petitioners appealed to the United States Court of Appeals for the Second Circuit.

In a Summary Order dated May 29, 2003, the united States Court of Appeals for the Second Circuit affirmed the judgment of the District Court "as modified in the following respects: (1) to eliminate any reference to Inventive in the District Court's award of back pay against Vidtape, Mohinder and Satinder Singh Anand; and (2) the reduce the Court's award of both back pay and liquidated damaged by $1,691.73 each ($3,383.46 in total), to eliminate any liability with respect to Hardeep Anand."

This petition for writ of certiorari follows because the rulings below were inconsistent with decisions of this Court and other Courts of Appeal.

REASONS FOR GRANTING THE WRIT

1. The Finding of the Courts Below, That Satinder Singh Anand Was an "Employer" Was Inconsistent with Decisions of this Court and of the United States Court of Appeals for the Second Circuit

The Department of Labor produced approximately 20 former employees of Vidtape who testified. These employees were unanimous in confirming the testimony of Mohinder Singh Anand that he was responsible for hiring and firing of employees; as well as setting work assignments and schedules.

Despite this fact, the trial court erroneously cited isolated portions of testimony in holding that Satinder Singh Anand was an "employer" of Vidtape and, as a result, presumably

liable for the money judgments. This decision was upheld by the Court of Appeals.

The underlying basis of the Court's decision was the testimony of an employee named Sarabjit Kaur, who stated that Satinder Singh Anand would "occasionally" instruct her concerning tasks to be performed and the testimony of Satinder Singh Anand who testified that he "very rarely" gave directions to employees concerning production. The Court, in its decision, also cited the testimony of Akhtar Majeed Khan who said that only in the absence of Mohinder Singh Anand, he spoke to Satinder Singh Anand and the testimony of Balwant Kaur who indicated that Satinder Singh Anand once asked her to work on a Sunday.

In contrast to this paucity of evidence, the courts, in rendering their decisions, totally ignored the fact that no other employee indicated that Satinder Singh Anand was responsible for hiring, firing, setting work schedules, setting rates of pay; or any other duty incumbent upon an "employer."

In contrast, Mohinder Singh Anand testified that he was the sole shareholder and officer of Vidtape from its inception. He also testified that he alone was responsible for making decisions related to the hiring and firing of employees as well as establishing the hours of employment and salary structure of Vidtape. Satinder Singh Anand confirmed that he never took part in any business related policy decisions for Vidtape. As a result, he had no input into the hiring and firing of employees nor did he establish salaries or work schedules.

As a salesman for Vidtape, Satinder occasionally instructed the production workers concerning prioritizing work so that certain orders could be met.

In determining whether any individual is an "employer" under the FLSA, the Courts have devised an "economic

reality test." *See, Goldberg v. Whitaker House Corp.*, 366 U.S. 28 (1961).

The Second Circuit, in the case of *Herman v. RSR Security Services, Ltd.*, 172 F.3d 132, 139-141 (2d Cir. 1999), recognized certain factors to examine in determining "economic reality." The Court held that "[u]nder the 'economic reality' test, the relevant factors include 'whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment; and (4) maintained employment records.'"

The Court then went on to quote from *Carter v. Duchess Community College*, 735 F.2d 8, 12 (2d Cir. 1984). In so doing, the Court recognized that "no one of the four factors standing alone is dispositive ... Instead, the 'economic reality' test encompasses the totality of circumstances, no one of which is exclusive. Since economic reality is determined based upon all the circumstances, any relevant evidence may be examined as to avoid having the test confined to a narrow legislative definition."

It is respectfully submitted that an examination of the record in the instant case clearly shows that the "economic reality" test concerning Satinder Singh Anand has not been satisfied.

There was no testimony advanced at the trial which confirmed that Satinder Singh Anand had the power to hire and fire employees. None of the former employees who testified on behalf of the Department of Labor stated that he or she was hired or fired by Satinder Singh Anand. Furthermore, there was no testimony that Satinder Singh Anand determined the rate of pay or the method of payment.

Lastly, no evidence was adduced to indicate that Satinder Singh Anand maintained employment records.

The trial court, in rendering its decision, stated that "Satinder hired some of the Vidtape employees." It is respectfully submitted that there was no testimony to support this conclusion.

The only credible testimony concerning Satinder Singh Anand was that he occasionally assigned or directed work. The reality of this was explained by Satinder Singh Anand who testified that in the course of his job duties as a salesman, it was sometimes necessary to tell the production staff to give priority to certain orders that were promised to customers. This alone, does not define Satinder Singh Anand as an "employer."

The criteria and factors to be examined, in determining whether an individual is an "employer" and has personal liability, have been delineated by the Courts. It is necessary to examine the totality of the factors cited in the "economic reality test." It is hereby submitted that an analysis of the factors contained in the "economic reality test establishes that there was insufficient evidence adduced at trial to hold that Satinder Singh Anand was an "employer" of Vidtape as a matter of law.

2. The Finding of the Courts Below, That the Department of Labor Was Entitled to Back Wages for Malkit Singh Was Inconsistent with Decisions of this Court and of the United States Court of Appeals for the Second Circuit

The Second Circuit Court of Appeals, in the case of *Reich v. Southern New England Telecomm Corp.*, 121 F.3d 58 (2d Cir. 1997) in recognizing that the Secretary of Labor has a burden of proof held "In meeting the burden under *Mt.*

Clemens, the Secretary need not present testimony from each underpaid employee; rather, it is well established that the Secretary may present the testimony of a representative sample of employees as part of his proof of the *prima facie* case under the FLSA. *See, Reich v. Southern Maryland Hospital, inc.*, 43 F.3d 949, 951 (4th Cir. 1995); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701-02 (3rd Cir. 1994).

The Second Circuit in *Southern New England Telecomm Corp.* continued by quoting from the case of *Secretary of Labor v. De Sisto*, 929 F.2d 789 (1st Cir. 1991). In so doing, the court stated: "[w]here the employees fall into several job categories, it seems to us that, at a minimum, the testimony of a representative employee from or a person with first-hand knowledge of each of the categories is essential to support a back pay award."

Despite the fact that the Court of Appeals addressed this issue in its decision, it ignored the rationale of the prior case law.

The court mistakenly placed an initial burden upon the defendants. This can best be seen by that portion of the decision which held "[D]espite the fact that numerous employees testified that Malkit Singh was a 'supervisor', defendants have not established that his job, whatever his supervisory responsibilities, was sufficiently different from the employees working alongside him to make their testimony as to conditions and hours of their employment inapplicable to him."

This decision failed to consider that the Department of Labor did not even satisfy its initial burden concerning Malkit Singh as enumerated in the *Southern New England Telecomm* case.

In fact, what the testimony indicated was that Malkit Singh was not only remunerated by a straight salary, as is the case of each and every employee, but also received "additional wages earned from sales calls and commissions." This fact was acknowledged by the Court of Appeals in its decision. As a result, it is impossible for anyone else to testify with familiarity concerning Malkit Singh's work class since, as the Court of Appeals recognized, he made "sales calls" and earned commissions.

In addition, to the reality that Malkit Singh, as opposed to the other employees, made sales calls and earned commissions, the testimony of the employees indicated a number of factors which contributed to place Malkit Singh in an employment class for himself.

Each of the witnesses producedby the Department of labor confirmed the special status of Malkit Singh as a supervisor, manager and executive of Vidtape.

Mohammed Kashif testified that Malkit Singh was his immediate supervisor and hired him. He further testified that Malkit Singh called him when it was necessary to work on a Sunday.

Akhtar Majeed Khan testified that he was interviewed by Malkit Singh. He then testified that "Malkit was the senior supervisor there when I worked." He described Malkit as the "warehouse foreman."

Manjit Kaur testified that Malkit was her immediate boss. It was Malkit Singh who put Manjit to work once she was hired and was the one who informed Manjit that she was hired.

Marta Argueta described Malkit Singh as "the boss" who told her what to do. She also testified that it was Malkit who

told her to work on Sundays.

Gurmito described Malkit Singh as a manager or supervisor with Vidtape. Balwant Kaler testified that she spoke to Malkit Singh about an increase in salary and that Malkit was the one who informed her when it was necessary to work on a Sunday.

Amar Singh Kaler testified he was hired by Malkit Singh and it was Malkit Singh who told him to work on Sundays.

Sukhwinder Kaur testified that she was interviewed by Malkit, the manager, prior to being hired.

Rajesh Kumari identified Malkit Singh as being the supervisor. She also testified that Malkit told her to work on Sundays.

Sukhwinder Singh Chhoker described Malkit Singh as his supervisor. Moreover, Ravinder Chhoker testified that Malkit was her supervisor and told her what her rate of pay was.

The testimony of the various employees was in conformity with the testimony of Mohinder Singh Anand who testified that Malkit was the manager who supervised employees and was paid at the scale of approximately $1,800 per month.

The unrebutted testimony was that Malkit was in an employee class by himself. He was identified as a "boss", a "foreman", and a "manager." Each employee testified that Malkit Singh supervised them, set work schedules and did hiring.

The pay checks for Malkit Singh, which were introduced into evidence, show that he was paid at a different rate than any other employee. There was no testimony from Malkit Singh or anyone else representing his employment class concerning his pay status.

As a result, the Court could not "reasonably conclude that there was 'sufficient evidence' to show the amount and extent of ... [uncompensated] work as a matter of just and reasonable inference." *Reich*, 121 F.3d at 67.

It is submitted that, there was no proof as to representational evidence for the employment class that included Malkit Singh. As a result, the determination as to back wages for Malkit Singh must be reversed.

It is further submitted that Malkit Singh is exempt from the provisions of the FLSA. One must first look at 29 U.S.C. §203(a)(1) which provides an exemption to minimum wage and overtime requirements for employees "employed in a *bona fide* executive, administrative or professional capacity ...."

It is interesting to note that Malkit Singh was originally a defendant in the within action and the Department of Labor, in its complaint, alleged that he was "in active control and management of said defendant corporation, regulated the employment of all persons employed by said corporation, acted directly and indirectly in the interest of defendant corporation in relation to said employees, and was thus an employer of said employees ...."

Each of the witnesses produced by the Department of Labor confirmed the special status of Malkit Singh as a supervisor, manager and executive of Vidtape.

It is respectfully submitted that the requirements for an exempt employee are discussed in 29 C.F.R. Part 541.1. That statute recognizes two separate tests, depending upon the salary of the employee. It is submitted that the "long test" was improperly applied by the Courts. The "long test" applies when an employee's salary is between $155 and $250 per week. The evidence clearly showed that Malkit Singh

was paid on a monthly basis, while the other employees were paid twice a month. His paychecks, which were introduced into evidence indicate that Malkit Singh was paid, after taxes, anywhere from $1,400.00 to $1,950.00, with the exception of his initial paycheck which was in the sum of $1,068.10 and which did not represent a full pay period. Therefore, it is unrefutable that Malkit Singh was paid in excess of $250 per week. As such, the "short test" contained in 29 C.F.R. Part 541.1(f) applies in deciding whether an exemption is appropriate. That section provides that an exemption is appropriate where the employee is compensated "at a rate not less than $250 per week ... and whose primary duties consist of the management of the enterprise or of a customarily recognized department or subdivision thereof and includes the customary and regular direction of the work of 2 or more employees ...." Malkit Singh meets all the requirements of an exempt employee. As such, there should have been no damage award pertaining to his employment.

3. The Finding of the Courts below, That Petitioners Violated the Minimum Wage and Overtime Provisions of the Fair Labor Standards Act, Is Inconsistent with the Standards Set by this Court and of Other United States Courts of Appeal

The Supreme Court in the case of *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) in discussing the burden of proof in FLSA cases held that "[a]n employee who brings suit under §16(b) of the Act for unpaid minimum wages or unpaid overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated." The Court, thus, went on to recognize that even in situations in which records are not readily available "an employee has carried out his burden if he proves that he has, in fact, performed work for which he was improperly

compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence."

A review of the testimony of the employees who gave evidence for the Department of Labor clearly established that it was replete with inconsistencies to such a degree that it was legally impossible to hold that the Department of Labor met its burden of proof as a matter of just and reasonable inference. The enormity of the inconsistencies has been documented earlier in the Petition. As a result, the lower courts were in error in holding that Petitioners violated relevant sections of the FLSA.

It is obvious that the testimony of the Department of Labor's witnesses established the following: (1) many acknowledged being paid properly; (2) many acknowledged they never worked on Sundays; (3) some did not know their rate of pay; (4) some indicated that they were not paid properly despite the fact that their pay checks showed otherwise; and (5) many changed the nature of their testimony concerning prior statements made to representatives of the Department of Labor.

It is respectfully submitted that, in view of these undisputed facts, the Department of Labor did not satisfy its burden of proof of showing "that he has in fact performed work for which he was improperly compensated ... as a matter of just and reasonable inference" as enumerated in the case of *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946).

4. The Finding of the Courts below, That the Department of Labor Produced Evidence of Damages, Was Inconsistent with Decisions of this Court and of Other United States Courts of Appeal

Although it must be conceded that Vidtape did not preserve its payroll records, this fact alone does not absolve the Department of Labor from a burden of proof as to potential damages. The Supreme Court in *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680, 687-88 (1945), in recognizing this type of situation held as follows,

> "In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produced sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate."

It is respectfully submitted that the Department of Labor not only failed in its burden of proof, but it also failed to prove damages for which a reasonable inference could be drawn.

The totality of the Department of Labor's proof concerning damages rested with the testimony and calculations of John Bialt. It is submitted by Petitioners that they met their burden of proof as delineated in *Anderson*, 328 U.S. at 687-88 and negated the reasonableness of any inference that could be drawn from the employee's evidence.

Mr. Bialt's testimony concerning damages was based upon false assumptions and was totally unreliable. Mr. Bialt used as the basis of his calculations the fact that each employee received $4 per hour. This assumption was contradicted by the testimony of most of Vidtape's employees. This flawed assumption only served to inflate possible damages. Moreover, Mr. Bialt accepted the assumption that each employee worked 2 Sundays per month which was above and beyond overtime hours. Once again, this contradicted the testimony of most of the employees who swore they did not work on Sundays.

Mr. Bialt's calculations were made contrary to his understanding of a "work week." These calculations required him to average out all the weeks worked to a net hours worked. He then calculated overtime wage due. Furthermore, Mr. Bialt made no concession in his calculations for absenteeism. It is inconceivable to accept statistics that ignore the fact that employees miss all or part of work days.

Lastly, Mr. Bialt ignored reviewing pay checks and other employment documents which were in existence and available to him. Instead, he created his own unreliable method of calculation.

It is respectfully submitted that Mr. Bialt's calculations were not logical and were not based upon the evidence. He accepted the worst possible scenario which could only lead to unreasonable damages.

The further unreliability of Mr. Bialt's calculations was shown by the fact that he admittedly ignored payroll records supplied by Vidtape which indicated the amount of hours worked per pay check as well as the actual pay checks. Thus, although not all payroll records were preserved, Mr. Bialt had an obligation to refer to payroll records that were in existence

and available. This he failed to do. As a result, his statistics cannot be credited.

During the course of the trial, Mr. Bialt was compelled to make adjustments to his calculations because of the unreliability of the testimony of the employees. Furthermore, Mr. Bialt failed to refer to the time cards which were preserved after May, 1997. These time cards, which were supplied to the Department of Labor and introduced into evidence, further indicated the unreliability of Mr. Bialt's calculations.

Perhaps the most glaring indication of the unreliability of Mr. Bialt's calculations concerns certain back wage figures he arrived at. Mr. Bialt's calculations for a Vidtape employee named Punian Akwal indicated he worked about 74 hours per week, excluding Sundays, and 86 hours if Sunday was included. Although Punian Akwal did not testify, there is no employee who testified to such a lengthy work week. In fact, Mr. Bialt then calculated an additional work week of 85.98 hours for Punian Akwal for a 6 day week. This was an obvious case in which an employee was paid substantially more than minimum wage.

Mr. Bialt admitted that he continued to calculate at $4 per hour even after the rate was increased to $4.75 per hour.

Mr. Bialt's calculations also indicated that an employee named Louis Garcia worked 75 hours per week, excluding Sundays, and that Kashmir Kaur worked 72.65 hours per week, excluding Sundays. In calculating the hours of Alcides Flores, who testified at the trial, Mr. Bialt calculated Alcides Flores worked 68.769 hours per week. This was more than the work schedule he testified to. It is obvious that these employees earned more money because they had a greater hourly wage rate rather than because they worked longer hours as Mr. Bialt assumed.

It is submitted that the Petitioners produced sufficient evidence "to negate the reasonableness of the inference to be drawn from the employee's evidence." The testimony of Petitioners'' witnesses further negated the reasonableness of the inference to be drawn from the employee's evidence.

Hardeep Anand, the bookkeeper for Vidtape, explained that she did the payroll for the corporation. She explained, in great detail, the process she utilized in calculating hours worked and payroll written. In contrast to the testimony of the witnesses produced by the Department of Labor, her testimony was reasonable and went unrebutted.

Mohinder Singh Anand, the President of Vidtape, explained in great detail the manner in which payroll was calculated. His testimony pointed out the errors in the Department of Labor's proof. Moreover, he created charts for each employee which indicated the manner in which their payroll was written and the propriety of the payroll figures. Mohinder Singh Anand, in preparing these charts, testified that he referred to the checks issued to each employee for wages. He then compared those checks with the payroll ledgers which were in existence and which reflected the employee's gross pay. He then worked off a calendar to break down the work week. Mohinder Singh Anand then calculated the sum of these checks, taking into account the wage scale of the employee, the hours worked and overtime payments. Using this procedure, it was concluded that all employees were paid properly. It is submitted that the results of his calculations, as to wages, were far more reasonable than those of the Department of Labor.

The proof adduced at the trial indicated that the Department of Labor did not prove that employees of Vidtape performed work for which they were improperly compensated nor has the Department of Labor produced sufficient evidence

to show the amount and extent of that work as a matter of just and reasonable inference. Moreover, even if the burden had shifted to the employer, the burden was met. The employer came forward with evidence to negate the reasonableness of the inference which could be drawn from the employee's evidence.

It is, therefore, respectfully submitted that the Department of Labor failed to produce proper evidence relating to damages as a matter of law.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

WOLIN & WOLIN, ESQS.

By: Alan E. Wolin, Esq.
Counsel of Record
Attorney for Petitioners
420 Jericho Turnpike, #215
Jericho, New York 11753
Telephone: (516) 938-1199
Facsimile: (516) 938-1178

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 02-6090, 02-6129

[Filed May 29, 2003]

ELAINE L. CHAO, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,

v.

VIDTAPE, INC., A Corporation,
INVENTIVE TECHNOLOGY SYSTEMS,
A Corporation, MOHINDER SINGH ANAND,
Individually, and as President of
VIDTAPE, INC., ARJAN SINGH ANAND,
Individually, and as an Officer of
VIDTAPE, INC., SATINDER SINGH ANAND,
Individually and as President of
INVENTIVE TECHNOLOGY SYSTEMS,
Defendants-Appellants.

Appeal from a judgment of the
United States District Court for the
Eastern District of New York
E. Thomas Boyle, Magistrate Judge

JUDGES: PIERRE N. LEVAL JOSE A. CABRANES Circuit Judges. J. GARVAN MURTHA* District Judge.

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and hereby is **AFFIRMED, AS MODIFIED**.

Defendants appeal from an amended judgment of the District Court dated April 22, 2002, granting injunctive relief to plaintiff, as well as $ 119,853.58 in back wages, $ 119,853.50 in liquidated damages, and costs.

I. Background

This action was brought by the Secretary of Labor ("the Secretary") against corporate defendants Vidtape, Inc. ("Vidtape") and Inventive Technology Systems, Inc. ("Inventive"), and their principals Mohinder, Satinder, and Arjan Singh Anand.

The Secretary alleged that defendants engaged in numerous violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, between May 1, 1995 and June 10, 1997, including: (1) failure to pay minimum wages; (2) failure to pay overtime wages; (3) employment of

---

* The Honorable J. Garvan Murtha, Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

a child; (4) violation of the "hot goods" provision of the Act by putting into the stream of commence goods produced in violation of the FLSA; and (5) violation of the FLSA's record-keeping provisions. The Secretary sought injunctive relief to enjoin these violations, as well as back-pay, liquidated damages, and costs on behalf of 67 employees.

At a bench trial, the District Court heard testimony presented by the Secretary from 21 former Vidtape employees who testified as to defendants' violations of the FLSA and from John Bialt Jr., an expert witness who performed back-wage calculations. Defendants countered this evidence with testimony from a former Vidtape employee; from three current Inventive employees; and from defendants Mohinder, Satinder and Arjan Singh Anand. In an amended opinion dated April 22, 2002, the District Court generally credited the trial testimony of plaintiff's witnesses over that of defendants' witnesses, and entered judgment in favor of the Secretary. *Chao v. Vidtape, Inc.*, 196 F. Supp. 2d 281 (E.D.N.Y. 2002).

The Court held that defendants had wilfully violated the FLSA's minimum wage, overtime, child labor, "hot goods," and record-keeping provisions. *Id.* at 292-97. Accordingly, the court: (1) permanently enjoined all defendants from violating various provisions of the FLSA; (2) held all defendants, except for Arjan Singh Anand (who the Court determined was not an "employer" under the FLSA), liable for $ 119,853.58 in back wages and $ 119,853.50 in liquidated damages; and (3) awarded costs to plaintiff. *Id.* at 298-300. Although the Court held Inventive liable for back wages in its judgment, this result is in conflict with the Court's dismissal at trial of all back wage claims against

Inventive, which had not yet commenced operations at the time of the alleged violations. *See id.* at 284, 296 n.6. The Secretary and defendants agree that Inventive should not have been held liable for back wages and, accordingly, the District Court's judgment will be modified to exclude Inventive from the Court's award of damages.

On appeal, defendants assert that the District Court erred: (1) in holding that Satinder Singh Anand was an "employer," (2) in holding that Vidtape and Inventive are one "enterprise," both subject to the Court's injunction, (3) in finding that defendants violated the minimum wage and overtime provision of the FLSA, (4) in it its computation of back wages, and (5) in holding that plaintiff was entitled to back pay on behalf of Vidtape employees Malkit Singh and Hardeep Anand.

II. Discussion

We have considered the first four arguments raised by defendants-appellants and find them to be without merit. Defendants' fifth argument, however--that the District Court erred in awarding back wages on behalf of employees Malkit Singh and Hardeep Anand--requires further discussion.

A. Liability with Respect to Malkit Singh

Defendants assert that Malkit Singh was exempt from the FLSA's minimum wage and overtime requirement because he was "employed in a bona fide executive, administrative or professional capacity," 29 C.F.R. § 541.1, thereby rendering the court's award of $ 9,890.40 in back wages and $ 4,409.17 in overtime pay with respect to him erroneous.

Under 29 C.F.R. § 541.1, the definition of an exempt "executive" varies depending on whether that employee is paid a salary between $ 155 and $ 250 per week or, alternatively, paid a salary of over $ 250 per week. 29 C.F.R. § 541.1(f). In order for a person making between $ 155 and $ 250 a week to be considered an executive, a defendant must satisfy what is commonly referred to as the "long test" by proving that the employees's "primary duties consisted of management of the enterprise, that he directed the work of two or more employees, that he had the power to hire or fire employees, that he customarily and regularly exercised discretionary powers, and that at least [eighty] per cent[1] of his time was allocated to supervisory duties." *Vidtape*, 196 F. Supp. 2d at 297 (citing 29 C.F.R. § 541.1 (requiring that all the above elements be met for the employee to be exempt)); *see Donovan v. Burger King Corp.* 675 F.2d 516, 517-18 (2d Cir. 1982) (discussing the "long" and "short" tests for executive status under 29 C.F.R. § 541.1). For employees making over $ 250 per week, however, a defendant need only satisfy what is commonly referred to as the "short test" by demonstrating that the employee's "primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein." 29 C.F.R. § 541.1(f); *see Burger King*, 675 F.2d at 517-18.

---

[1] The District Court stated "twenty per cent" in its opinion, but this articulation is clearly a mistake, as the statute requires that an executive under the "long test" spend "no more than 20 percent" of his time on non-supervisory functions. 29 C.F.R. § 541.1(e).

The District Court applied the "long test" because Malkit Singh was paid a monthly salary of $ 719, as demonstrated by Vidtape's payroll records. However, defendants argue that the "short test" should apply because pay checks from the relevant time period indicate that Malkit was actually paid between $ 1068 and $ 1950 per month, which is, on average, more than $ 250 per week. This discrepancy in salary between the Vidtape's payroll records and Malkit's pay checks appears to be the result of his having received, in addition to his salary of $ 719 per month, additional wages earned from sales calls and commissions. *See Vidtape*, 196 F. Supp. 2d at 297. Because only wages accrued "on a salary basis," count toward the calculation, 29 C.F.R. § 541.1(f), we agree with the District Court that the "long test" was appropriate. *See Kelly v. City of Mount Vernon*, 162 F.3d 765, 766 (2d Cir. 1998) (discussing the "salary basis" requirement). Accordingly, we also agree with the District Court that under that test, Malkit cannot be considered an exempt executive because defendants have not demonstrated that Makit meets each of the factors required to be considered under the "long test." *See Vidtape*, 196 F. Supp. 2d at 297-98.

Even if Malkit Singh is not an exempt "executive," defendants suggest an alternative argument that the award of back wages to Malkit was inappropriate to the extent that his minimum wage and overtime amounts were calculated without regard to his wages from his commissions, as reflected in his pay checks. *See, e.g., Biggs v. Wilson*, 1 F.3d 1537, 1542 (9th Cir. 1993) (holding that commissions may count toward the minimum wage and overtime requirements, so long as a proper minimum amount is paid within each relevant pay period). However, the pay checks introduced by defendants

showing that Malkit was actually paid between $ 1068 and $ 1950 per month during the relevant time period do not indicate how many hours Malkit Singh worked, or how many of those hours might have constituted overtime wages. Defendants have not presented to this Court any estimate of their own as to how many regular and overtime hours Malkit Singh worked or how the wages actually paid compare to the minimum and overtime wages that should have been paid to Malkit Singh each week. Other than suggesting that no damages are appropriate--a proposition that seems impossible --[2] defendants have failed to suggest an alternative calculation of damages. Defendants have not proved, with precision, that the Secretary's estimates with respect to Malkit Singh were incorrect or otherwise unreasonable, or that the District Court's acceptance of those figures was clearly erroneous. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88, 90 L. Ed. 1515, 66 S. Ct. 1187 (1946) (requiring evidence as to the precise amount of time worked or as to the unreasonableness of the plaintiff's methodology).

Finally, we reject defendants' additional argument that the District Court's award of back wages to Malkit Singh was improper because "[w]here the employees fall into several job

---

[2] For example, assuming a monthly pay check of $ 1068 (at the low end of Malkit Singh's monthly pay, from his pay check dated July 5, 1996), and a regular workweek of 60 hours (consistent with the Court's findings of fact, *see Vidtape*, 196 F. Supp. 2d at 287), then Malkit Singh was paid a wage of approximately $ 4.14 per hour (assuming 4.3 weeks in a month), below the minimum wage of $ 4.25 at that time, even excluding time-and-a-half for overtime. It seems clear in this case that, at the very least, some back wages on behalf of Malkit Singh are warranted.

categories, . . . at a minimum, the testimony of a representative employee from, or a person with first-hand knowledge of, each of the categories is essential to support a back pay award." *Reich v. Southern New England Telecomm. Corp.* ("SNET"), 121 F.3d 58, 67 (2d Cir. 1997) (quoting *Secretary of Labor v. DeSoto*, 929 F.2d 789, 793 (1st Cir. 1991)) (internal quotation marks omitted). Despite the fact that numerous employees testified that Malkit Singh was a "supervisor," defendants have not established that his job, whatever his supervisory responsibilities, was sufficiently different from the employees working alongside him to make their testimony as to the conditions and hours of their employment inapplicable to him. In fact, two employees testified to the effect that Malkit Singh worked the same hours as they did at the factory. Tr. at 321-22, 401-02. The testimony of those employees was sufficient to support an award of back-pay award with respect to Malkit Singh. *See Vidtape*, 196 F. Supp. 2d at 298.

B. Liability with Respect to Hardeep Anand

We agree with defendants that the District Court should not have awarded the Secretary back pay on behalf of Hardeep Anand, who testified that she was a bookkeeper and secretary in the offices of Vidtape and was responsible for calculating payroll. *Id.* at 288-89. Defendants assert that because she was the only employee who testified that she performed bookkeeping duties, and because her testimony, which was not directly contradicted by any other employee, indicated that she was paid proper wages, the District Court's award of back pay with respect to her was improper. Defendants again cite the *SNET* case to support their claim that "where the employees fall into several job categories,

. . . at a minimum, the testimony of a representative employee from, or a person with first-hand knowledge of, each of the categories is essential to support a back pay award." *SNET*, 121 F.3d at 67.

We agree with defendants that the Secretary presented insufficient evidence to establish as a matter of just and reasonable inference that defendants paid sub-minimum wages or failed to pay proper overtime wages to Hardeep Anand. Although the District Court did not credit her testimony regarding her knowledge of the overtime wages and hours paid to employees in her capacity as a bookkeeper, *Vidtape*, 196 F. Supp. 2d at 288-89, and did not believe her testimony that she was in fact paid proper wages, *id.* at 297, neither the District Court nor the Government has questioned the fact that Hardeep Anand was in fact a bookkeeper as she claims. Assuming that she was a bookkeeper, the District Court, however much it may have disbelieved her testimony, could not rely solely on the testimony of the 21 witnesses presented by the Secretary--none of whom were bookkeepers or held a position even remotely similar to that of bookkeeper--to establish her regular work hours and practices. The District Court erred when it held defendants liable for back wages on behalf of Hardeep Anand because the Government did not offer sufficient proof that she was paid improper wages as a matter of just and reasonable inference. The judgment of the District Court will therefore be modified to eliminate its award of $ 1,691.73 in back wages, and an equal amount in liquidated damages, with respect to Hardeep Anand. *See Vidtape*, Ex. A.

* * *

We have considered all of defendants' arguments. The judgment of the District Court is hereby **AFFIRMED, AS MODIFIED** in the following respects: (1) to eliminate any reference to Inventive in the District Court's award of back pay against Vidtape, Mohinder, and Satinder Singh Anand; and (2) to reduce the Court's award of both back pay and liquidated damages by $ 1,691.73 each ($ 3,383.46 in total), to eliminate any liability with respect to Hardeep Anand.

FOR THE COURT,

Roseann B. MacKechnie, Clerk of Court

By /s/_____

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

CV 98-3359 (ETB)

[Filed April 22, 2002]

ELAINE L. CHAO,	)
Secretary of Labor United States	)
Department of Labor,	)
Plaintiff,	)
	)
v.	)
	)
VIDTAPE, INC., INVENTIVE	)
TECHNOLOGY SYSTEMS, INC.,	)
MOHINDER SINGH ANAND,	)
SATINDER SINGH ANAND, and	)
ARJAN SINGH ANAND,	)
Defendants.	)
	)

E. THOMAS BOYLE, United States Magistrate Judge

AMENDED MEMORANDUM OPINION, ORDER AND JUDGMENT

The Secretary of Labor (hereinafter "Plaintiff" or

"Secretary") commenced this action on May 1, 1998, pursuant to Fair Labor Standards Act, 29 U.S.C. § 201 et seq. ("the Act"), after an investigation of the labor practices of the defendants. This court held a bench trial on April 23, 2001 to May 1, 2001, and the parties gave summations on October 18, 2001. At the conclusion of the trial, all back wage claims against Inventive Technology Systems, Inc. ("Inventive") were dismissed. This court granted judgment in favor of the Secretary on March 29, 2002.

On April 9, 2002, the Secretary moved, pursuant to Rule 59(e) to amend this court's judgment dated March 29, 2002. In particular, the Secretary moved: (1) to remove the award of pre-judgment interest; (2) to include violations of 29 U.S.C. § 215(a)(1) in the judgment; and (3) to rescind the award of $ 11,000 in civil money penalties for child labor violations. Defendants do not oppose the Secretary's motion. The Secretary's motion is granted. This Amended Memorandum Opinion, Order and Judgment reflects the requested modifications of the Memorandum Opinion, Order and Judgment, dated March 29, 2002.

The complaint, which was amended on July 20, 2000, alleges that from the period of May 1, 1995 to approximately June 10, 1997, the corporate defendants Vidtape, Inc. ("Vidtape") and Inventive and the individual defendants Mohinder Singh Anand ("Mohinder"), Satinder Singh Anand ("Satinder") and Arjan Singh Anand ("Arjan") willfully violated various provisions of the Act. These violations include: (1) failing to pay employees proper minimum wage; (2) failing to pay employees adequate overtime wages; (3) employing a child in violation of the child labor provision; (4)

violating the "hot goods" provision of the Act by putting in the stream of commerce goods manufactured in violation of these laws; and (5) violating the Act's record-keeping provisions. The Secretary seeks an injunction to prevent defendants from future violations of the Act, and a judgment ordering defendants to pay: (1) minimum wage compensation in the amount of $ 50,649.25; (2) overtime wages in the amount of $ 70,716.30; (3) liquidated damages in the amount of $ 121,365.55; and (4) costs. (*See* Amended Complaint; Plaintiff's Revised Exh. 21a and 22a.) This memorandum opinion and order constitutes the findings of fact and conclusions of law pursuant to Rule 52, Fed. R. Civ. P.

FINDINGS OF FACT

A. Introduction

Defendant Vidtape is a New York corporation incorporated in January, 1988. Defendant Inventive is a Delaware corporation incorporated on June 18, 1997. Prior to April, 1998, Vidtape manufactured and duplicated videocassette tapes. On February 26, 1998, Vidtape sold its manufacturing operation to Inventive. (Defendants' Exh. L.) Currently, Inventive manufactures and duplicates videocassettes, while Vidtape markets and sells Inventive's product. Vidtape and Inventive were located at the same property in West Babylon, New York and are currently located at the same property in Farmingdale New York. (T. 732-733, 752.)

Defendant Mohinder Singh Anand is the president, sole officer, and sole shareholder of Vidtape. (T. 565, 723, 765.)

Satinder Singh Anand, Mohinder's brother, was formerly employed at Vidtape, and is currently the president of Inventive. Arjan Singh Anand, the father of Mohinder and Satinder, was never employed by Vidtape, but currently works as Inventive's general manager. (T. 713-716.) The Nihang Nivas trust is the sole shareholder of Inventive's stock. Arjan is the trustee of the Nihang Nivas trust, and the beneficiaries of the trust are Mohinder's wife, children, and mother. Satinder is also a beneficiary of the trust. (T. 599.)

B. Employer Status of the Individual Defendants

1. Mohinder Singh Anand

Mohinder, the president of Vidtape, controls and manages the operations at his company. He hired employees, terminated employees, set wage rates, set Vidtape's pay system, and signed Vidtape pay checks. He also supervised employees. (T. 567, 568, 606, 725, 774, 569, 572, 776, 572.)

2. Satinder Singh Anand

Employees testified that Satinder gave them work assignments and supervisory directions. Satinder hired some of the Vidtape employees. (T. 348-349, 726; Plaintiff's Exh. 13, Kumar dep. at 13-14, 27-28.) Employees reported to Satinder in the absence of Mohinder. (T. 62.) Satinder directed some employees to report to work on Sundays and he directed employees not to report to work after the Department of Labor commenced its investigation. (T. 315, 117.) Satinder also had the authority to sign checks for Vidtape and did so

when Mohinder was unavailable. (T. 763, 758, Defendants' Exh. A.) The court credits this testimony.

Satinder testified that he was not an employer of Vidtape and that he only worked there on commission as its salesman. He stated he never fired employees, never set work hours or work schedules, never directed or supervised employees, and never dealt with payroll issues. (T. 721-726.) The court does not credit this testimony by Satinder. It is undisputed that Satinder is the current president and employer of Inventive, the portion of the enterprise that manufactures the videotapes and employs the majority of the minimum wage employees.

3. Arjan Singh Anand

Arjan, the father of Mohinder and Satinder, has never been a shareholder, corporate officer, or employee of Vidtape. (T. 713, 715.) He testified that he never gave orders, hired, fired, or set policies for employees. (T. 713-714, 717.) Arjan did visit his sons at work during the midday and discussed financial matters with them at lunch. (T. 713, 719.) Hardeep Anand testified that Arjan brought lunch for his sons a few days a week and that during the time he was at the office, he read a religious book. (T. 652.) The court credits this testimony.

Vidtape employees testified that they viewed Arjan as a "boss." (T. 270, 149, 288, 309, 333, 398, 477.) This testimony is credited. Occasionally, Arjan directed employees as to their jobs and gave them videotapes to be duplicated. (T. 50, 309, 333, 404, 437, 454-455.) This testimony is not credited.

Arjan is currently employed part-time as Inventive's general manager, where he maintains Inventive's inventory and procures spare parts. (T. 716.)

B. Enterprise

Vidtape manufactured videotapes at its factory in West Babylon. Inventive was formed on June 18, 1997, days after the Department of Labor commenced its formal investigation of Vidtape. Inventive began manufacturing videotapes on April 30, 1998, one day before the Department of Labor filed its complaint in this action. (Defendants' Exh. G.)

Vidtape sold its manufacturing operations to Inventive for $ 175,000. (T. 729, Defendants' Exh. L.) The book value of the assets was $ 120,000. (T. 785.) To pay for this, Inventive assumed Vidtape's $ 175,000 Keybank corporate bank loan. (T. 782-786, 878, Defendants' Exh. L, P-T.) Mohinder and Vidtape are guarantors of this loan. (T. 756, Defendants' Exh. P-T.) The asset sale agreement did not include warranties of merchantability or fitness. (T. 752, Defendants' Exh. L.)

Vidtape is Inventive's primary customer, with approximately 90% of Inventive's product marketed by Vidtape under Vidtape's label. (T. 613, Defendants' Exh. M.) Vidtape sales are over $ 500,000 annually and Vidtape and Inventive ship their product in interstate commerce. (*See* Letter of Jerold Wolin dated Oct. 29, 2001; T. 571-572, 615; Plaintiff's Exh. 12.)

When Inventive began its manufacturing operations, Vidtape employees resigned and were hired as Inventive employees. They signed a waiver stating:

> I [name], of [address] hereby acknowledge that I am resigning as an employee of Vidtape, Inc. as of April 30, 1998. I further acknowledge that during the course of my employment with Vidtape, Inc. I have had no claims for past due [**8] wages, or anything else. My period of employment with Vidtape, Inc. has been satisfactory.
>
> This acknowledgment is being signed by me voluntarily and of my own free will. There has been no pressure exerted upon me by anyone to sign this document. The contents of this document have been translated for me in [language], which is my native language.

(Defendants' Exh. G.) Employees observed no change between employment at Vidtape and employment at Inventive, other than a different corporate name on their pay check. (T. 367-368, 397.) The court credits this testimony.

D. Knowledge of Fair Labor Standards Act

Since the early 1990s, Mohinder had knowledge of minimum wage and overtime laws. (T. 590, 609-610.) Specifically, he knew that employers must pay employees one and a half times their hourly rate when they worked over forty hours per week, that the minimum wage was $ 5.15 at the time of his deposition, and that the law required

employers to keep time cards. (T. 589-590, 609-610.) Vidtape posted a Department of Labor poster in the lunchroom. (T. 587.) The court credits this testimony.

Employees testified that after the Department of Labor commenced its investigation, Mohinder held a meeting where he instructed Vidtape employees to tell investigators that their work schedule was 8:30 a.m - 5:00 p.m., Monday - Friday. He also instructed employees to tell investigators that they were paid the proper minimum wage of $ 4.25 per hour and that they received overtime wages at a rate of one and one-half their regular rate. (T. 358-359, 406.) The court credits this testimony of employees and does not credit the conflicting testimony of Mohinder.

E. Vidtape's Record-Keeping Practices

Prior to June 10, 1997, Vidtape did not maintain proper records as required by the F.L.S.A. Employees recorded their hours using time cards when they arrived in the morning and when they left at the end of the day. Hardeep Anand, Vidtape's bookkeeper, testified that Vidtape maintained these time cards for approximately two weeks after it issued employee paychecks. If no corrections to employee wages were necessary, she discarded the time cards. (T. 574.) The latter testimony is not credited. Mohinder directed her to discard the time cards. (T. 780-781.) After June 10, 1997, the date the Department of Labor began its formal investigation, Vidtape began preserving its time cards. (T. 781-782.)

Vidtape's payroll records for 1995, 1996, and part of 1997 show that Vidtape employees received two pay checks

per month. (*See* Plaintiff's Exh. 2, 3, 4.) Vidtape's two pay periods during this time were the first to fifteenth day of the month, and the sixteenth to last day of the month. (*See id.*; T. 586, 796-797.) Vidtape's payroll records for this period did not contain the employees' hourly rates, number of hours worked per day, the number of hours worked per week, or the number of hours worked for each bi-monthly pay period. (*See* Plaintiff's Exh. 2, 3, 4, T. 880-881.) No other records containing this information were maintained or preserved by Vidtape. (T. 573.)

Vidtape paid most employees by check. On pay day, employees received a pay check, but no pay stub or other information that indicated the hourly rate, hours worked, gross pay, or amount of deductions taken.[1] (T. 20-21, 46, 81-82, 144, 210, 240, 286, 307, 408, 575-576, 689.)

F. Testimony of Plaintiff's Witnesses

At trial, twenty-one former Vidtape employees testified for the Secretary as to the hours they worked and the pay they received. These employees testified in English, Spanish, and Punjabi.

---

[1] Three plaintiff witnesses, however, testified to cash payments in whole or in part. Muhammed Kashif testified that he and his friend "Omer" were paid $ 3.50 per hour in cash, "off the books." (T. 35, 46.) Two others stated that after working forty hours, the additional hours were paid in cash at $ 3.50 per hour. (T. 382, 435.)

1. Work Schedule

The employees testified that they typically worked from 8:30 a.m. to 7:00 p.m., Monday through Saturday. (T. 21, 47, 62-63, 79, 109-110, 145-146, 210-211, 237-239, 249-251, 265, 283, 306-307, 318-319, 330-331, 347-348, 352, 400, 431, 452, 472.) They took thirty minute lunch breaks and had one or two short breaks as well. (T. 63, 145, 210-211, 238, 266, 352, 400.) Some employees also worked on Sundays. (T. 110, 147, 211, 282, 308, 330, 335, 353, 401, 431, 452, 473.) This consistent testimony indicates that employees worked an average of sixty hours per week and the court credits this testimony offered by the Secretary.

Many of the employees traveled together to and from work on the Long Island Railroad. Vidtape transported its employees to and from the train station in a company van. (T. 331-332, 347-349, 401, 772-773.) The court credits this testimony.

2. Hourly Wage and Overtime

The employees testified that their wage was $ 4.00 per hour, and $ 3.50 per hour after taxes. (T. 19-20, 78, 98, 433.) Some employees testified that Vidtape never told them what wage the company paid its employees. (T. 143, 217, 245, 264.) Beginning about June 10, 1997, immediately following the commencement of the Department of Labor investigation by a visit to the defendants' premises, employees received wages of $ 4.75 per hour, which was the statutory minimum wage at that time. The employees also testified that

they did not receive overtime pay prior to June 10, 1997. (T. 65, 67, 79, 99.)[2] The court credits this testimony.

3. Reconstruction of the Employees' Back Wages

John Bialt Jr. analyzed Vidtape's payroll records and testified about the back wage computations he performed for each employee. Because no records of hours worked, hourly wage or overtime compensation existed, Bialt reconstructed estimates of this information based on the gross pay, as stated in Vidtape's payroll records. (T. 490.)

Bialt divided the gross pay by the $ 4.00 per hour wage figure to calculate an estimated number of hours worked per fifteen day pay period. Then he recalculated the number of weeks worked[3] and the average number of hours worked per

---

[2] Akhtar Majeed Khan testified that he received an hourly rate of $ 8.00 per hour for all hours he worked. (T. 65, 62, 67.) He worked as a "production controller/maintenance" worker. (T. 61.) His duties included maintaining and repairing the video loading machines, preparing paperwork for shipping, and supervising the warehouse in the absence of Malkit Singh. He did not perform tasks such as duplication or packaging of videotapes. (T. 68.) This employee therefore is not entitled to any minimum wage back pay award, although he is entitled to a back pay overtime award. (See Exh. A annexed hereto, at 2.)

[3] Bialt used the following formula:

> (Number of Vidtape pay periods the employee worked)/(24 Vidtape pay periods per year) x (52 weeks per year) = Estimated number of weeks Vidtape employee worked.

week. Once Bialt calculated the average number of hours worked per week, he calculated the minimum wage deficiency and overtime deficiency owed to each employee. (T. 494-503.) (*See* Plaintiff's Exh. 21a.)

On cross examination, Bialt admitted that in some circumstances, his average hours calculations were higher than the witnesses' testimony of working sixty hours per week. Bialt also stated that although time cards were available after June 10, 1997, he did not examine them in preparing his wage calculations. (T. 545, 547, 552.)

Because Plaintiff's Exhibit 21a, which was prepared prior to commencement of the trial, did not conform to the evidence adduced by the Secretary at trial, the Secretary submitted revised wage calculations prior to the close of trial but following the general admission of evidence. (See Plaintiff's Revised Exh. 21a.) This exhibit reflects the testimony of the Secretary's witnesses at trial. The revised calculations exclude additional wages for Sunday, since the testimony at trial revealed that Sunday hours were included in the bi-monthly paychecks. These calculations also reflect the stipulation that Vidtape began paying its employees minimum wage beginning with the June 16 - June 30 pay period. The Secretary also submitted a revised summary chart. (*See* Revised Exh. 22a.) The court has not relied on any summary chart submitted by the Secretary prior to summations.

---

5. Child Labor

Wilber Amaya testified that he was fourteen years old when Vidtape hired him to pack videos and move boxes using a "hand truck." (T. 77, 809-810.) At his interview, he presented his INS work permit to Mohinder and Hardeep Anand, which indicated that Amaya was born on September 2, 1982. (T. 88-89, 76, 101-102, Plaintiff's Exh. 23.) Amaya worked ten hour days, six days a week, during the months when school was in session. (T. 79-80, 90, Plaintiff's Exh. 4.) Vidtape terminated Amaya after the Department of Labor began its investigation. (T. 87.) The court credits this testimony.

G. Testimony of Defense Witnesses

1. Hardeep Anand

Hardeep Anand, the aunt of Mohinder and Satinder, testified that she worked as Vidtape's bookkeeper and secretary. She calculated the payroll every two weeks. (T. 646-647.) She stated that she used the minimum wage figures of $ 4.25, $ 4.75 and $ 5.15 to calculate the payroll. (T. 648-649.) She also testified that she calculated overtime wages for the employees. (T. 649.) The court does not credit this testimony.

On cross-examination, Hardeep was not able to calculate the gross wage that she had written in the payroll records. She stated that she needed the time cards to perform this function. (T. 666-667.)

2. Delia Alvarado

Delia Alvarado who is presently employed by Inventive, testified that when she was hired in June, 1995 she earned $ 4.25 per hour. (T. 681, 682.) She stated her hours were Monday - Friday, 8:30 a.m. to 7:00 p.m. (T. 683.) She also testified that when she received her pay check, she reviewed the amount to be sure she was paid the proper wage and overtime. (T. 684.) The court does not credit this testimony.

3. Pridam Singh

Pridam Singh, a current Inventive employee, testified that he started working for Vidtape in 1997. (T. 696, 703.) He stated that he earned $ 4.75 per hour. When he began work, his hours were 8:30 a.m. to 7:00 p.m. Monday through Friday, but a few months later his hours were reduced to 8:30 a.m. to 5:00 p.m. (T. 697.) The court does not credit this testimony.

4. Sunder Shahani

Sunder Shahani, a current Inventive employee, testified that he earned $ 5.75 per hour when he was hired June 2, 1997 to work at Vidtape. He stated his hours were 8:30 a.m. to 5:00 p.m. Monday through Friday and that he received overtime pay for any additional hours worked. (T. 705.) Shahani also testified that his paychecks contained details as to deductions taken, including his first paycheck of June 18, 1997. The court does not credit this testimony. When shown this check on cross examination, he admitted that no such deductions were shown.

5. Arjan Singh Anand

Arjan testified that he was not employed by Vidtape and that he never hired, fired, set wages, set hours, or set policies for employees. (T. 714, 717.) He was present at the factory between 10:00 am and 2:00 pm during the week, but stated he was not involved in business discussions. (T. 718.) The court credits this testimony.

6. Satinder Singh Anand

Satinder testified that he worked on commission for Vidtape as a salesman. (T. 722, 724.) He stated he never hired or fired any employees, and rarely gave instructions to employees regarding production. (T. 725-726.) The court does not credit this testimony.

7. Mohinder Singh Anand

Mohinder testified as to the history of Vidtape since its incorporation in 1988. (T. 764-769.) He sold the manufacturing aspect of his business so that he could concentrate on sales. (T. 783.)

Mohinder stated employees were always informed of their wage rates, they worked Monday to Friday, 8:30 a.m. to 7:00 p.m., and they received overtime pay. (T. 777, 811.) He testified that the policies he set were in compliance with the F.L.S.A. (T. 590, 609-610.) He also testified that he directed Hardeep Anand to dispose of the time cards. (T. 781.) The court does not credit this testimony.

He stated that Malkit Singh managed the warehouse until January 1997, when Dilbag Singh and Pridam Singh replaced him. (T. 772.) According to Mohinder, Malkit drove employees to and from the train station, and then instructed employees as to which department they should work. (T. 772-773.) During the day, he made sales calls, but returned to drive employees to the train station and lock the factory. (T. 773.) Angus Gayle supervised the production area. (T. 772.) The court does not credit this testimony.

To rebut the calculations prepared by the Secretary, Mohinder prepared his own calculations. (*See* Defendants' Exh. X, Y.) For the period of June 1, 1997 to June 15, 1997, he made his calculations based on the preserved employee time cards and on his assertions regarding the employees' wages and work schedule. (T. 849.) For the period of May 1, 1995 to June 1, 1997, when the time cards were destroyed, Mohinder reviewed the payroll records, employee pay checks, and used a calendar to calculate the proper seven day work week. Based on his assertions as to the employees' work schedule as ten hour days, five days a week, along with his assertion that the employees were paid the proper minimum wage and overtime, he calculated the amount of pay that each employee received per week. He stated that the gross amount reported in the ledger was the same amount as his calculations, and concluded that under his version of the calculations, the employees were paid properly, and no back wages were owed. (T. 856-867.) The court does not credit Defendants' Exh. X or Y or the corresponding testimony of Mohinder.

On cross examination, rounding of calculations and mathematical errors in calculations in the chart were highlighted, indicating that Mohinder's calculation of the total pay did not match the gross wages that the employees received. (T. 897-898, 899.)

CONCLUSIONS OF LAW

A. Introduction

At the outset, the court in assessing the credibility of the witnesses, finds the testimony of plaintiff's employee witnesses were credible. These employees testified in English, Spanish, Urdu and Punjabi. The testimony spanned over the entire period of the Secretary's investigation, and many of the witnesses had never met, and were unable to communicate with each other. Nonetheless, all stated the same information as to wages and hours. The court does not find the testimony of the defense witnesses to be credible.

B. Employer

Defendants Mohinder and Satinder, but not Arjan, were employers under the Act. "Employer" is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d); *see also Herman v. RSR Sec. Svcs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999) (noting that "employer" should be interpreted expansively.) Factors examined under the Second Circuit's economic reality test in determining whether an individual is an employer include: (1) whether the alleged employer had the power to hire and fire employees; (2) whether he or she

supervised and controlled employee work schedules or conditions of employment; (3) whether he or she determined the rate and method of payment; and (4) whether he or she maintained employment records. *See* RSR Sec. Svcs., 172 F.3d at 139. Since this is a "totality of the circumstances test," any relevant evidence can be examined, and not all factors are required to be present. *See id.*

1. Mohinder Singh Anand

Mohinder was the primary employer at Vidtape. He was the president and sole shareholder of Vidtape (T. 764, 651), he had the power to hire, fire and supervise the employees, he set the work schedule of 8:30 a.m. to 7 p.m. (T. 777, 725), and he determined the rate of pay for the employees. (T. 45.) He delegated the authority to his bookkeeper to calculate the wages, but he knew how to calculate them himself (T. 649). He also directed his bookkeeper to dispose of the employment records. (T. 781.)

2. Satinder Singh Anand

Satinder, Mohinder's brother, was also an employer under the Act. Employee witnesses for the Secretary stated that Satinder hired them (T. 208, 318, 774, Plaintiff's Exh. 13, Kumar dep. at 14), they reported to him when Mohinder was not available, and he sometimes directed them to work on the weekend. (T. 62, 315.) Satinder had authority to sign checks for Vidtape, and did so on numerous occasions. (T. 763, Defendants' Exh. A.) He also prioritized work for employees and instructed employees as to aspects of their job. (T. 606, 348-349, 726, Kumar dep. at 14, 27-28.) Further, after

Inventive purchased the manufacturing portion of Vidtape, Satinder became the president and employer for those who previously worked at Vidtape.

3. Arjan Singh Anand

Arjan, the father, does not meet the definition of employer under the F.L.S.A. and the economic reality test. He was never an owner, shareholder, or officer of Vidtape. (T. 712-13.) He never received a paycheck from Vidtape, and he stated he never gave orders, hired, fired, or set policies for the employees. (T. 713.) The court credits this testimony. Employees did see him at the factory during mid morning and early afternoon in the office, and most thought he was a "boss" when asked, (T. 270, 149, 288, 309, 333, 398, 477), but this testimony is insufficient to support a definition of employer under the economic realities test. Although he occasionally gave the employees orders or directions and did attend some employee meetings, (T. 333, 62), he did not hold an integral role in Vidtape's operations, or in setting work policies, schedules or conditions of employment.[4]

C. Enterprise

Vidtape and Inventive are an "enterprise" under the Act. All employees of the enterprise are therefore covered by the Act, regardless of whether or not they work in the division or

---

[4] With regard to the injunction of future violations against Inventive, Arjan is an employer. He is Inventive's general manager (T. 716), and he is also the fiduciary of the trust that holds 100% of Inventive's stock. (T. 713.)

corporation that has committed the violations. The Act defines enterprise as "the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units." 29 U.S.C. § 203(s)(1)(A); *see also Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512, 517, 93 S. Ct. 1138, 1141, 35 L. Ed. 2d 463 (1973) (stating the three elements a court should examine in determining whether an enterprise exists are related activity, uniform operations or common control, and common business purpose).

1. Related Activity

Vidtape and Inventive were a unified operation. After the sale of Vidtape's assets to Inventive, the two remained integrally related to each other and their business activities were intertwined. Vidtape's sole provider of videotapes was Inventive. (*See* Requirement Contract, Defendants' Exh. 613.) Vidtape concentrated solely on sales of Inventive's product. (T. 719.) Ninety percent of Inventive's sales were to Vidtape. (T. 613.) The two corporations share the same office and warehouse space. (T. 734.) Additionally, employees who worked for Vidtape testified that when they commenced employment with Inventive, there was no change in their employment situation other than a different corporate name on their employment checks. (T. 367-368, 397.)

The sale of Vidtape's assets was not an arms length transaction. The purchase price was exactly equal to the outstanding loans on the assets of the corporation. (T. 728.)

Typical warranties of fitness and merchantability were not given for this transaction. (T. 752.) Mohinder and Vidtape personally guaranteed the loan transaction. (T. 756, Defendants' Exh. P.) Further, the sale of Vidtape's assets and the corporate restructuring raise issues as to a legitimate business purpose, especially since the manufacturing operations under the Inventive corporate name began one day before the Secretary commenced this action. (T. 761.)

2. Common Control

Although the shareholders, officers and directors of the two corporations are not the same people, the common control element remains. The enterprise is a family business. Satinder was an employer at Vidtape and is an employer at Inventive. Mohinder and Vidtape guaranteed Inventive's corporate loan for the manufacturing assets. Additionally, Mohinder's wife and children are beneficiaries of the Nihang Nivas trust which owns 100% of Inventive's stock. For these reasons, Mohinder and Satinder's common control of the enterprise is apparent.

3. Engaged in Commerce

Defendants do not dispute that Vidtape and Inventive were engaged in commerce during the period of the Secretary's investigation. An enterprise is "engaged in commerce or in the production of goods in commerce" if employees are engaged in the production of goods for commerce and the enterprise has an "annual gross volume of sales . . . not less than $ 500,000." 29 U.S.C. § 203(s)(1)(A). Defendants admitted in their amended answer that the enterprise (Vidtape

and Inventive) had over $ 500,000 in annual sales at all relevant times encompassed by the amended complaint. (*See* Amended Answer at ¶ 9, *see also* Amended Complaint at XI.) The Secretary at trial adequately proved that the enterprise engaged in commerce.

D. Record-Keeping Violations

Defendants violated the Act's record-keeping provisions. Under § 211(c), "every employer subject to . . . this Act . . . shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time." 29 U.S.C. § 211(c). The court has reviewed the defendants' payroll records (the only records in existence) for the period of July 3, 1995 to September 30, 1997. (*See* Plaintiff's Exh. 2-4.) The records state the employee's name, address, the fifteen day period for which the employee was paid, the date paid, the check number, the gross wage, deductions for social security, disability, federal tax, New York tax, and the employee's net pay. These records do not, however, indicate the sex and occupation of the employee (*see* 29 C.F.R. 516.2(a)(4)), the time of day and day of week in which the work week begins (*see* 29 C.F.R. 516.2(a)(5)), the regular hourly rate of pay for any work week (*see* 29 C.F.R. 516.2(a)(6)), the hours worked each workday and total hours worked each work week (*see* 29 C.F.R. 516.2(a)(7)), the total daily or weekly straight-time earnings or wages due (*see* 29 C.F.R. 516.2(a)(8)), or the total premium pay for overtime hours (*see* 29 C.F.R. 516.2(a)(9)).

Additionally, employees testified that they never received a pay stub or a calculation of their wages or hourly rates when they received their pay checks. Vidtape did not establish a 7-day, 168-hour established "work week". *See* 29 C.F.R. 516.2. Payroll records indicate that instead of establishing a work week, the employees were paid twice a month, on approximately a fifteen day pay period.

For the period of May 1, 1995 to June 1, 1997, defendants also violated the provision requiring the preservation of time cards. *See* 29 C.F.R. 516.6(a)(1). Trial testimony established that Mohinder directed bookkeeper Hardeep Anand to dispose of the employees' time cards after she issued the employees' checks. (T. 781, 574, 653.)

After June 1998, defendants used the computerized Paychex payroll system to maintain their records. (*See* Plaintiff's Exh. 6.) These records do not show the number of hours the employee worked in a week and they do not define the work week, in violation of 29 C.F.R. 516.2.

Additionally, some employees testified that they were paid cash. (T. 46, 382, 474, 433-434.) No record of these payments has been preserved. These practices also violate § 211 of the Act.

E. Evidence Standard

When an employer fails to keep records in conformity with his statutory duty, the Supreme Court has set forth a burden shifting analysis for calculating the amount of uncompensated work.

> An employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The matter then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-88, 66 S. Ct. 1187, 1192, 90 L. Ed. 1515 (1946); *see also Reich v. Southern New England Telecom. Corp.*, 121 F.3d 58, 66-68 (2d Cir. 1997) (stating the Secretary's burden is to produce "sufficient evidence to establish that the employees have in fact performed work for which they were improperly compensated and produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference"). Testimony from a group of employee witnesses about the hours worked and pay received is sufficient representation to calculate the amount of wages owed to the enterprise's entire workforce. *See id.* (stating "the Secretary may present the testimony of a representative sample of employees as part of his proof of the prima facie case under the Act"). Since the defendants destroyed their employees' time cards and have no other records of the hours worked or wages paid to their employees, the burden shifting analysis set forth in Mt. Clemens Pottery Co. is applicable.

1. The Secretary has met her burden

In this case, twenty-one witnesses testified for the Secretary as to the wages they earned and the hours they worked at Vidtape. This is sufficient to establish the working conditions for the entire sixty-seven employees for whom the Secretary has claimed wages. These witnesses stated that they worked 8:30 a.m. to 7 p.m., Mondays through Saturdays, and approximately two Sundays a month. Most stated that they received $ 4.00 per hour in wages (or $ 3.50 per hour after taxes were taken out). They did not receive a premium wage for overtime hours.

2. Defendants have failed to produce precise evidence to negate plaintiff's inference

Defendants' evidence is not sufficient to negate the inferences drawn by the employee witnesses who testified for the Secretary. Defendants' witnesses and Mohinder's calculations did not establish the precise amount of hours worked before June 10, 1997. The court does not find the testimony of the defense witnesses (who stated they worked 8:30 a.m. to 7:00 p.m. Monday to Friday and received the proper statutory wages) to be credible in light of the overwhelming evidence presented by the Secretary. One defense witness was the aunt of Mohinder and Satinder, and others were current employees of Inventive. (T. 660, 681, 695, 704.)

Defendants' Exhibit Y was also insufficient evidence of the precise amount of hours worked. These calculations, which were derived in a manner similar to Bialt's

calculations, did not show the "precise amount of work performed." *Mt. Clemens Pottery Co.*, 328 U.S. at 687-88. They were also replete with mathematical errors and rounding in order to make it appear that the employees' gross wages correspond with the defense's testimony as to work schedule and wages. For these reasons, these calculations are insufficient to overcome the overwhelming evidence presented by the plaintiff.

Further, the waiver that Vidtape required its employees to sign before their resignation (*see* Defendants' Exh. G) is an insufficient defense to this action. The employees signed the waiver at the direction of Vidtape employers, and some employees testified that it was not translated into their native language. *See Tho Dinh Tran v. Alphonse Hotel Corp.*, 281 F.3d 23, 35 (2d Cir. 2002) (finding a waiver of all back wage claims that the plaintiff signed was an insufficient defense when the plaintiff was pressured to sign it, he did not understand the terms of the agreement, and the waiver was vague).

F. Minimum Wage Violations

Under § 206, the rate of pay per hour must be at least $ 4.25 (ending September 30, 1996), $ 4.75 (ending August 31, 1997), and $ 5.15 (currently). Minimum wage should be calculated on a work week basis, defined as a 7-day, 168 hour period. *See* 29 U.S.C. § 206.

The Secretary's witnesses testified that their gross wages before June 10, 1997[5] were $ 4.00 per hour. Since no accurate records or other evidence were produced by defendants to negate the credible testimony of these nineteen witnesses, under *Mt. Clemens Pottery Co.*, the court draws the reasonable inference that the defendants did violate the minimum wage provisions of the Act.

G. Overtime Violations

Under § 207, no employees engaged in commerce shall work longer than forty hours per week unless the employee "receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half the regular rate at which he is employed." 29 U.S.C. § 207; *see also* 29 C.F.R. 778.109. Plaintiff's witnesses consistently testified that they did not receive overtime pay for the extra hours they worked. Since their average work week was between sixty to seventy hours, overtime compensation is owed to them.

H. Child Labor Violation

In employing Wilbur Amaya, defendants violated the Act's child labor provision. Section 212(c) of the Act provides that "no employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the

---

[5] The parties stipulated that "no claims" would be pursued after June 16, 1997, the last pay period before the Department of Labor's Investigation. (T. 836, 843-845.)

production of goods for commerce." "Oppressive child labor" is defined as a "condition of employment under which . . . any employee under the age of sixteen years is employed by an employer . . . in any occupation." 29 U.S.C. § 203(l). Children between the age of 14 and 16 cannot be employed for more than three hours a day, 18 hours per week when school is in session, and 8 hours a day, 40 hours a week when school is not in session. Children may only work between 7 a.m. and 7 p.m. during school, and until 9p.m. in the summer. *See* 29 C.F.R. 570.35(a). The regulations also state that minors are not permitted to work in occupations that involve manufacturing of goods. *See* 29 C.F.R. 570.33(a) - 570.33(e).

Wilber Amaya testified that he was hired by Mohinder. At his interview, Amaya presented Mohinder with his work card, which stated his date of birth was 1982. (*See* Plaintiff's Exh. 23.) Amaya worked at Vidtape in 1997 for approximately one year. He was fourteen years old when he began working. (T. 78.) He worked six days a week between the hours of 8:30 a.m. and 7:00 p.m. (T. 79.) He packed videos, used a lift, a hand cart, and machinery such as the video cassette machine. (T. 78, 88.) Vidtape terminated Amaya when the Department of Labor's investigation began. (T. 87.) Although Mohinder testified and defendants asserted as an affirmative defense that the minor child was hired at the request of a relative and that defendants were not aware they violated child labor law (T. 808, Answer ¶ 16), intent or wilfulness is not an element of this offense. *See* 29 U.S.C. § 212, 29 C.F.R. 570.

I. Hot Goods

The defendants violated the "hot goods" provision by manufacturing products in violation of the Act. The "hot goods" provision in § 215(a)(1) provides that it is unlawful for any person to "transport . . . ship . . . deliver or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed" in violation of minimum wage, overtime or child labor restrictions. 29 U.S.C. § 215(a)(1). The remedy for violation of this provision is an injunction (*see* § 217). Vidtape violated the "hot goods" provision by manufacturing videotapes in violation of the Act and then shipping them in interstate commerce. An injunction is warranted.

J. Willful

The court finds that defendants acted willfully. The Supreme Court has defined employment practices as willful when "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by statute." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 108 S. Ct. 1677, 1681, 100 L. Ed. 2d 115 (1988); *see also Reich v. Waldbaum, Inc.*, 52 F.3d 35, 39 (2d Cir. 1995) (stating "if an employer acts unreasonably but not recklessly. . . then its action should not be considered willful") (citations omitted). Mohinder and Satinder admitted that they had knowledge of the minimum wage and overtime laws. (T. 776, 855.) More than one witness indicated that before the Department of Labor interviewed employees, Mohinder had a meeting and told his employees to lie about their wages and hours worked. (T. 359, 406.) Further, a poster in the break room notified the employees of their rights

under the Act. (T. 649.) For these reasons, a three year period for compensation of back wages beginning on May 1, 1995 is applicable. *See* 29 U.S.C. § 255(a).

K. Damages[6]

The Secretary seeks compensation for sixty-seven employees. The Secretary seeks the following amount of damages: $ 50,649.25 in minimum wage violations for the period of May 1, 1995 - June 10, 1997 and $ 70,716.30 in unpaid overtime wages for the period of May 1, 1995 - October 5, 1997. (*See* Plaintiff's Summary Chart submitted after trial.) The Secretary also seeks liquidated damages in the amount of $ 121,365.55, for a total award of $ 242,731.10.

The Act's "Penalties" provision provides that employers who violate the minimum wage or overtime provisions shall be liable to the employees for unpaid wages, unpaid overtime, "and in an additional equal amount as liquidated damages." 29 U.S.C. § 206(b). Unless the employer shows "to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [Act]," liquidated damages should be awarded. 29 U.S.C. § 260.

The defendants destroyed all documentation related to hours worked or wages paid to their employees, such as time

---

[6] All back wage claims against Inventive were dismissed at the end of the Secretary's case. (T. 642.)

cards and pay stubs. In the absence of these records, the court finds the method used by the Secretary in calculating back wages owed to the employees to be reasonable. For the period of May 1, 1995 to June 10, 1997, the court finds that Vidtape paid its employees $ 4.00 per hour for all hours worked, and did not pay overtime. The employees worked approximately sixty hours per week. This is the default standard that the court will use in calculating damages. Aside from cash payments to Muhammed Kashif, all calculations are based on the gross pay as stated in the defendants' payroll records. Further, as stipulated by the parties, the court finds that after the Department of Labor initiated its investigation on June 10, 1997, Vidtape reduced its work schedule to 8:30 a.m. to 5:00 p.m. Monday to Friday and increased its wages to the statutory minium. (T. 836, 845.)

For these reasons, unless specifically discussed below, or due to a mathematical error by the Secretary, as noted by the court, the court awards back wages in the amount the Secretary has requested, and as set forth in Exhibit A.[7] Vidtape, Mohinder, and Satinder intentionally set these policies in deliberate violation of the Act. For this reason, liquidated damages will be awarded in an amount equal to the back wages that are owed.

---

[7] Exhibit A annexed hereto is based solely on Plaintiff's Revised Exh. 21a, and not on Plaintiff's Exh. Revised Exh. 22a, or Plaintiff's summary chart submitted prior to summation, as the numbers for certain employees in Revised Exh. 22a and the summary chart do not correspond with those in Revised Exh. 21a. *See, e.g.* claims for Sarabjit Kaur, Hardeep Anand.

1. Overtime claims after June 16, 1997

The Secretary has claimed overtime wages for various employees for the period of June 18, 1997 until October 5, 1997. The parties stipulated at trial that "no claims" would be pursued after June 16, 1997. (T. 836, 845.) Additionally, the Secretary's investigator, John Bialt, testified that in calculating this overtime, he did not examine the time cards, even though they had been preserved. (*See* Defendants' Exh. D.) The Secretary continues to base overtime claims after June 16, 1997 on Bialt's mathematical formula. For these reasons, plaintiff's claim for overtime wages after June 16, 1997 are denied.

2. Back wages for defense witnesses

The Secretary has claimed back wages for Hardeep Anand, Delia Alvarado, Pridam Singh and Sunder Shahani. These employees testified for the defense that they were paid the proper minimum and overtime wages. Indeed, in the Secretary's revised calculations, the claim for Hardeep Anand was calculated at the minimum wage that she testified to. The Secretary argues that these witnesses were untruthful, that they actually worked the same schedule as the other employees, and that they earned only $ 4.00 per hour.

The court finds itself in a quandary. Witnesses who testified untruthfully should not profit from their perjury. At the same time, if defendants are not directed to pay this claim, they will benefit from encouraging their employees to speak untruthfully. For these reasons, the court directs that all back wages owed to Hardeep Anand, Delia Alvarado, Pridam

Singh and Sunder Shahani in the amount of $ 5389.75 be deposited with the Clerk of this Court who shall forthwith deposit such money with the Treasurer of the United States. *See* 28 U.S.C. § 2041.

3. Malkit Singh

The defendants specifically object to the minimum wage claim of $ 9890.40 and overtime claim of $ 4409.17 for Malkit Singh. They argue that he received a monthly salary of $ 719 and that he earned additional wages on sales calls and commissions. Section 203 provides an exemption to the minimum wage and overtime requirements for employees "employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman." 29 U.S.C. § 203(a)(1).

Plaintiff's witnesses testified that Malkit supervised them during the day and that they saw him in the factory during the day. (T. 321-322, 402.) Mohinder testified that Malkit was present in the factory only when he drove employees to and from the train station, and when returned at night to lock the factory. During the rest of the day, Mohinder contended that Malkit worked as an outside salesman. The court does not credit Mohinder's testimony.

The defense's testimony of Malkit's duties did not adequately establish that he was an exempt employee under the regulations. There was insufficient evidence to establish that Malkit's primary duties consisted of management of the enterprise, that he directed the work of two or more employees, that he had the power to hire or fire employees, that he customarily and regularly exercised discretionary

powers, and that at least twenty per cent of his time was allocated to supervisory duties. *See* 29 C.F.R. 541.1 (requiring all elements to be met for the employee to be exempt). Further, Mohinder's testimony regarding Malkit's duties did not establish the requirements of an outside salesman, as no information was provided regarding whether Malkit obtained orders or contracts, or for what percentage of time Malkit was engaged in sales. *See* 29 C.F.R. 541.5. Based on the lack of evidence at trial, defendants have not sustained their burden of proving Malkit's status as an exempt worker, either as an "executive" or as an "outside salesman." *See Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97, 94 S. Ct. 2223, 2229 (1974); *see also Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 614 (2d Cir. 1991) (stating the employer "bears the burden of proving that its employees fall within an exempted category of the Act").

Defendants have failed to support their contention that the Secretary was required to present a representative supervisory witness to substantiate the claims made for Malkit is without merit. No law has been cited by defendants and the court's research has failed to uncover any support for this argument. The court finds it sufficient that various witnesses for the Secretary testified that they saw Malkit working during the day at the factory. Defendants have failed to establish that Malkit is an exempt employee. *See* 29 C.F.R. 541.1.

For these reasons, the court awards the minimum wage claim of $ 9890.40, and the overtime wage claim of $ 4409.17 for Malkit Singh.

4. Unexplained Wage Claims in Plaintiff's Exhibit 21a

The Secretary claims $ 1693.65 for Vijay Kumar. While $ 278.07 was calculated in a manner different from the typical formula used for the other employees, the transcript of the witness admitted into evidence shows that this employee never received his final pay check, because he did not give Vidtape a month's notice before resigning. (Plaintiff's Post Trial Submission at P56; Plaintiff's Exh. 13, Kumar dep. at 35.) The defendants did not question Kumar about this statement. For this reason, the claim will be permitted.[8]

Further, the claim for Hardeep Anand in plaintiff's Revised Exh. 22a does not correlate to her claim in Revised Exhibit 21a. Since Exhibit 22a is a summary of the calculations performed, the court only relies on the calculations performed in Revised Exhibit 21a, which claims $ 1691.73 plus an additional unsubstantiated $ 394.61. For these reasons, the court awards $ 1691.73.

L. Prospective Injunction Against Future Violations

Pursuant to § 217, the Secretary is entitled to the equitable relief of an injunction restraining Vidtape, Inventive, Mohinder, Satinder and Arjan from future violations of the Act based upon the conclusion that they willfully violated the Act's minimum wage, overtime, record keeping, child labor and "hot goods" requirements. See Plaintiff's proposed conclusions of law ¶ 23.

---

[8] This claim was included as a Minimum Wage Claim in Exhibit A.

An injunction against the enterprise is warranted in this case. Since the court finds that Inventive and Vidtape are an enterprise, even though back wage claims were dismissed against Inventive, an injunction is warranted against both corporations. An injunction is also warranted against Mohinder and Satinder, the two individual employers who set work policies in violation of the Act and against Arjan, who is the general manager of Inventive.

M. Judgment for Back Wages and Liquidated Damages

Defendants Mohinder Singh Anand, Satinder Singh Anand, Vidtape, and Inventive are jointly and severally liable for the back wages and liquidated damages totaling $ 239,707.16. *See Falk v. Brennan*, 414 U.S. 190, 38 L. Ed. 2d 406, 94 S. Ct. 427 (1973), 29 C.F.R. 791.

The provisions of this order relative to back wage payments shall be deemed satisfied when defendants deliver to the Bank of America, U.S. Department of Labor, ESA, Wage and Hour Division, P.O. Box 845229 Dallas, TX 75284-5229 certified checks or bank checks or money orders made payable to each individual employee listed in Exhibit A and in the alternative "or Wage-Hour, Labor" (e.g. "Amar Singh Kaler or Wage-Hour, Labor") in the net amount due each said employee after making legal deductions from the gross amounts of back wages only and not from liquidated damages or pre-judgment interest listed opposite their names. Said payments shall be delivered no later thirty (30) days from the entry of this order.

Defendants shall make available to plaintiff the social security number and last known address of each employee or former employee listed in Exhibit A. The Secretary shall distribute the proceeds of such checks to the employees involved, or to their estates, if that is necessary.

Neither defendants nor any one on their behalf shall directly or indirectly solicit or accept the return or refusal of any sums paid as back wages and liquidated damages under this Judgment. Any sums which cannot be distributed to the employees named herein, or to their personal representatives because of inability to locate the proper persons or because of such persons' refusal to accept such sums, shall be deposited with the Clerk of this Court who shall forthwith deposit such money with the Treasurer of the United States pursuant to 28 U.S.C. §§ 2041 and 2042.

The Secretary, in paragraph XVIII(4) of her amended complaint, seeks an order awarding plaintiff the costs of this action. Plaintiff is hereby additionally awarded costs.

JUDGMENT

A. INJUNCTION

I. ORDERED, ADJUDGED AND DECREED, that defendants Vidtape, Inc., Inventive Technology Systems, Inc, Mohinder Singh Anand, Satinder Singh Anand and Arjan Singh Anand, their officers, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, or otherwise, be, and they hereby are, permanently enjoined and restrained from violating the provisions of §§ 6(a)(1), 7(a)(1), 11(c), 12(c), 15(a)(1), 15(a)(2), 15(a)(4), and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended, (52 Stat. 1060, 29 U.S.C. §§ 201-219, et seq.), hereinafter called the Act, in the following manners:

1. Defendants Vidtape, Inc., Inventive Technology Systems, Inc, Mohinder Singh Anand, Satinder Singh Anand and Arjan Singh Anand shall not, contrary to § 6 of the Act, pay to any of their employees who in any work week are engaged in commerce or in the production of goods for commerce, or employed in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act, wages at rates less than those which are now, or which in the future may become, applicable under § 6 of the Act.

2. Defendants Vidtape, Inc., Inventive Technology Systems, Inc, Mohinder Singh Anand, Satinder Singh Anand and Arjan Singh Anand shall not, contrary to § 7 of the Act, employ any of their employees in any work week who are

engaged in commerce or in the production of goods for commerce, or employed in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act, for work weeks longer than the hours now, or which in the future become, applicable under §§ 7 and 15(a)(2) of the Act, unless the said employees receive compensation for their employment in excess of the prescribed hours at rates not less than one and one-half times the employees' regular rates.

3. Defendants Vidtape, Inc., Inventive Technology Systems, Inc, Mohinder Singh Anand, Satinder Singh Anand and Arjan Singh Anand shall not, contrary to §§ 12(c) and 15(a)(4) of the Act, employ minors under the age of eighteen years in commerce or in the production of goods for commerce, or in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act, on jobs or during hours which constitute oppressive child labor as defined in § 3(l) of the Act and the Regulations issued pursuant thereto and found at 29 C.F.R. Part 570, Subpart C, § 570.35.

4. Defendants Vidtape, Inc., Inventive Technology Systems, Inc, Mohinder Singh Anand, Satinder Singh Anand and Arjan Singh Anand shall not fail to make, keep, and preserve adequate records of their employees and of the wages, hours, and other conditions and practices of employment maintained by them, as prescribed by the Regulations issued pursuant to §§ 11(c) and 12 of the Act and found at 29 C.F.R. Part 516 and 29 C.F.R. § 570.36.

B. BACK PAY AND LIQUIDAT ED DAMAGES

II. ORDERED, ADJUDGED AND DECREED that Defendants Vidtape, Inc., Inventi ve Technology Systems, Inc., Mohinder Singh Anand and S tinder Singh Anand shall not withhold the back wages due t e employees and former employees listed on Exhibit A. D efendants Vidtape, Inc., Inventive Technology Systems, Inc , Mohinder Singh Anand and Satinder Singh Anand sh all pay to plaintiff's representatives $ 119,853.58 in un paid minimum wage and overtime compensation, and $ 1 19,853.50 in liquidated damages, for a total amount of $ 23 9,707.58; and it is further

ORDERED that any monies due pe sons named in Exhibit A, annexed hereto and not so distribut ed by plaintiff within one (1) year, because of plaintiff's ina ility to locate the proper person or said persons' refusal to ac cept such money, shall be deposited with the Clerk of the C ourt who shall forthwith deposit such money with the Treas urer of the United States pursuant to 28 U.S.C. § 2041; and it is further

ORDERED, that if payment is not t endered within such time, additional interest shall be due de fendants' employees and former employees at the applicable adjusted prime rate, and it is further

C. COSTS

IV. ORDERED, ADJUDGED AND DECREED that the costs of this action shall be tax d by the Clerk against defendants Vidtape, Inc., Inventi ve Technology Systems, Inc., Mohinder Singh Anand and S atinder Singh Anand.

The clerk of the court is directed to enter judgment and mark this case as closed.

SO ORDERED.

Dated: Central Islip, New York
April 22, 2002

/s/_____
E. THOMAS BOYLE
United States Magistrate Judge

SEE FOLDOUT

EXHIBIT A

WAGE INFORMATION CHART

EXHIBIT A

Name	Minimum Wage Underpayment Claim	Overtime Under-payment Claim	Total Claim by Secretary	Minimum Wage Award by Court	Overtime Award by Court	Total Award by Court
Aguirre, L	12.69	0.00	12.69	12.69	0.00	12.69
Akhter, W	57.75	122.47	180.22	57.75	122.47	180.22
Akwal, P	2417.72	6037.46	8455.18	2417.72	6037.46	8455.18
Alfard, F	121.50	0.00	121.5	121.50	0.00	121.5
*Alvarado, D	1527.56	1582.77	3110.33	1527.56	1582.77	3110.33
Alvarez, M	1204.41	1137.90	2342.31	1204.41	1137.90	2342.31
Amaya, W	642.59	593.98	1236.57	642.59	593.98	1236.57
*Anand, H	0.00	2086.34	2086.34	0.00	1691.73	1691.73
Argueta, M	1187.25	1083.71	2270.96	1187.25	1083.71	2270.96
Benitez, O	115.25	109.50	224.75	115.25	109.50	224.75
Bonilla, C	24.50	24.08	48.58	24.50	24.08	48.58
Caceres, M	59.01	501.49	560.49	59.01	501.49	560.50
Campos, A	116.19	66.76	182.95	116.19	66.76	182.95
Catano, A	400.70	1011.54	1412.24	400.70	1011.54	1412.24
Chetal, M	238.69	371.28	609.97	238.69	371.28	609.97
Chhokar, R	162.38	459.27	621.64	162.38	459.27	621.65
Chhokar, S	167.44	502.31	669.75	167.44	502.31	669.75
Chodha, A	36.56	126.15	162.72	36.56	126.15	162.71
Clarosz, C	1020.21	554.57	1574.78	1020.21	554.57	1574.78
Cruz, J	89.38	0.00	89.38	89.38	0.00	89.38
Cruz, Re	27.75	51.70	79.45	27.75	51.70	79.45
Cruz, Ri	87.50	190.72	278.22	87.50	190.72	278.22
Escalante, J	108.63	0.00	108.63	108.63	0.00	108.63
Euseda, F	1741.06	2214.76	3955.82	1741.06	2161.14	3902.2
Flores, A	1129.81	1169.41	2299.22	1129.81	1122.89	2252.7

EXHIBIT A

Name	Minimum Wage Underpayment Claim	Overtime Under-payment Claim	Total Claim by Secretary	Minimum Wage Award by Court	Overtime Award by Court	Total Award by Court
Flores, J	58.50	0.00	58.5	58.50	0.00	58.5
Garcia, L	1599.31	1832.89	3432.21	1599.31	1832.89	3432.20
Gayle, A	0.00	167.96	167.96	0.00	167.96	167.96
Ghuman, A	288.75	447.53	736.28	288.75	296.86	585.61
Gomez, M	851.07	710.04	1561.10	851.07	710.04	1561.11
Gomez, S	1364.50	1104.15	2468.65	1364.50	1104.15	2468.65
Gonzalez, J	898.22	161.22	1059.44	898.22	161.22	1059.44
Gurmito	681.81	1221.92	1903.72	681.81	1221.92	1903.73
Hernandez, J	24.25	0.00	24.25	24.25	0.00	24.25
Ibarra, M	190.13	142.55	332.67	190.13	142.55	332.68
Jaico	230.71	855.82	1086.54	230.71	855.82	1086.53
Kaler, A	1192.40	1279.56	2471.96	1192.40	1279.56	2471.96
Kaler, B	1047.88	1130.33	2178.20	1047.88	1130.33	2178.21
Kashif, M	205.50	216.75	422.25	205.50	216.75	422.25
Kaur, J	148.56	157.74	306.3	148.56	157.74	306.3
Kaur, Ka	472.2	1803.91	2276.11	472.2	1803.91	2276.11
Kaur, Ku	300.88	618.26	919.13	300.88	618.26	919.14
Kaur, M	401.63	579.62	981.25	401.63	579.62	981.25
Kaur, Sa	800.98	3516.52	4317.5	800.98	3516.52	4317.5
Kaur, Suk	200.49	2696.94	2897.43	200.49	2696.94	2897.43
Kaur, Sur	1500.00	1731.42	3231.42	1500.00	1661.85	3161.85
Khan, A	0.00	749.32	749.32	0.00	749.32	749.32
Kumar, V	679.12	1014.53	1693.65	679.12	1014.53	1693.65
Kumari, R	1671.00	2850.33	4521.33	1671.00	2489.71	4160.71
Malhotra, D	2443.57	3888.92	6332.48	2443.57	3888.92	6332.49

Name	Minimum Wage Underpayment Claim	Overtime Under-payment Claim	Total Claim by Secretary	Minimum Wage Award by Court	Overtime Award by Court	Total Award by Court
Pereira, N	19.88	0.00	19.88	19.88	0.00	19.88
Rashid, M	503.81	360.31	864.12	503.81	360.31	864.12
Reyes, A	0.00	116.09	116.09	0.00	0.00	0.00
Reyes, O	81.38	51.66	133.03	81.38	51.66	133.04
Romero, T	2429.34	3817.13	6246.47	2429.34	3747.73	6177.07
Ruiz, P	935.81	699.06	1634.87	935.81	699.06	1634.87
Sanchez, V	1618.47	2578.20	4196.66	1618.47	2578.20	4196.67
Shah, B	454.56	483.45	938.01	454.56	410.12	864.68
*Shahni, S	0.00	120.21	120.21	0.00	0.00	0.00
Singh, A	2475.19	5209.93	7685.11	2475.19	5154.35	7629.54
Singh, B	259.13	544.90	804.03	259.13	544.90	804.03
Singh, G	777.31	765.26	1542.57	777.31	765.26	1542.57
Singh, H	321.00	884.68	1205.68	321.00	884.68	1205.68
Singh, Ka	502.40	1471.76	1974.16	502.40	1409.24	1911.64
Singh, Ku	233.75	0.00	233.75	233.75	0.00	233.75
Singh, M	9890.40	4409.17	14299.57	9890.40	4409.17	14299.57
*Singh, P	263.92	323.77	587.70	263.92	323.77	587.69
TOTAL	**50714.34**	**70711.98**	**121426.25**	**50714.34**	**69139.24**	**119853.58**

* Award to be deposited with Clerk of Court who shall forthwith deposit such money with the Treasurer of the United States.

District Court Amended Memorandum Opinion and Order and Judgment - 04/22/02

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

CV 98-3359 (ETB)

[Filed April 22, 2002]

ELAINE L. CHAO,	)
Secretary of Labor United States	)
Department of Labor,	)
Plaintiff,	)
	)
v.	)
	)
VIDTAPE, INC., INVENTIVE	)
TECHNOLOGY SYSTEMS, INC.,	)
MOHINDER SINGH ANAND,	)
SATINDER SINGH ANAND, and	)
ARJAN SINGH ANAND,	)
Defendants.	)
	)

ORDER

The plaintiff's unopposed Motion Pursuant to F. R. Civ. P. Rule 59(e) to Amend the Judgment is GRANTED.

DATED: 4/22/02, 2002
Central Islip, NY

/s/_____
E. THOMAS BOYLE
United States Magistrate Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

CV 98-3359 (ETB)

[Filed March 29, 2002]

ELAINE L. CHAO, Secretary of Labor United States Department of Labor, Plaintiff,	)
v.	)
VIDTAPE, INC., INVENTIVE TECHNOLOGY SYSTEMS, INC., MOHINDER SINGH ANAND, SATINDER SINGH ANAND, and ARJAN SINGH ANAND, Defendants.	)

E. THOMAS BOYLE, United States Magistrate Judge

MEMORANDUM OPINION, ORDER AND JUDGMENT

The Secretary of Labor (hereinafter "Plaintiff" or "Secretary") commenced this action on May 1, 1998, pursuant to Fair Labor Standards Act, 29 U.S.C. § 201 et seq. ("the Act"), after an investigation of the labor practices of the defendants. This court held a bench trial on April 23, 2001 to May 1, 2001, and the parties gave summations on October 18, 2001. At the conclusion of the trial, all back wage claims against Inventive Technology Systems, Inc. ("Inventive") were dismissed.

The complaint, which was amended on July 20, 2000, alleges that from the period of May 1, 1995 to approximately June 10, 1997, the corporate defendants Vidtape, Inc. ("Vidtape") and Inventive and the individual defendants Mohinder Singh Anand ("Mohinder"), Satinder Singh Anand ("Satinder") and Arjan Singh Anand ("Arjan") willfully violated various provisions of the Act. These violations include: (1) failing to pay employees proper minimum wage; (2) failing to pay employees adequate overtime wages; (3) employing a child in violation of the child labor provision; (4) violating the "hot goods" provision of the Act by putting in the stream of commerce goods manufactured in violation of these laws; and (5) violating the Act's record-keeping provisions. The Secretary seeks an injunction to prevent defendants from future violations of the Act, and a judgment ordering defendants to pay: (1) minimum wage compensation in the amount of $50,649.25; (2) overtime wages in the amount of $70,716.30; (3) liquidated damages in the amount of $121,365.55; and (4) costs. (*See* Amended Complaint; Plaintiffs Revised Exh. 2la and 22a.) This memorandum opinion and order constitutes the findings of fact and conclusions of law pursuant to Rule 52, Fed. R. Civ. P.

FINDINGS OF FACT

A. Introduction

Defendant Vidtape is a New York corporation incorporated in January, 1988. Defendant Inventive is a Delaware corporation incorporated on June 18, 1997. Prior to April, 1998, Vidtape manufactured and duplicated videocassette tapes. On February 26, 1998, Vidtape sold its manufacturing operation to Inventive. (Defendants' Exh. L.) Currently, Inventive manufactures and duplicates videocassettes, while Vidtape markets and sells Inventive's product. Vidtape and Inventive were located at the same property in West Babylon, New York and are currently located at the same property in Farmingdale New York. (T. 732-733,752.)

Defendant Mohinder Singh Anand is the president, sole officer, and sole shareholder of Vidtape. (T. 565, 723,765.) Satinder Singh Anand, Mohinder's brother, was formerly employed at Vidtape, and is currently the president of Inventive. Arjan Singh Anand, the father of Mohinder and Satinder, was never employed by Vidtape, but currently works as Inventive's general manager. (T. 713-716.) The Nihang Nivas trust is the sole shareholder of Inventive's stock. Arjan is the trustee of the Nihang Nivas trust, and the beneficiaries of the trust are Mohinder's wife, children, and mother. Satinder is also a beneficiary of the trust. (T. 599.)

B. Employer Status of the Individual Defendants

1. Mohinder Singh Anand

Mohinder, the president of Vidtape, controls and manages the operations at his company. He hired employees, terminated employees, set wage rates, set Vidtape's pay system, and signed Vidtape pay checks. He also supervised employees. (T. 567, 568, 606, 725, 774, 569, 572, 776, 572.)

2. Satinder Singh Anand

Employees testified that Satinder gave them work assignments and supervisory directions. Satinder hired some of the Vidtape employees. (T. 348-349, 726; Plaintiff's Exh. 13, Kumar dep. at 13-14, 27-28.) Employees reported to Satinder in the absence of Mohinder. (T. 62.) Satinder directed some employees to report to work on sundays and he directed employees not to report to work after the Department of Labor commenced investigation. (T. 315, 117.) Satinder also had the authority to sign checks for Vidtape and did so when Mohinder was unavailable. (T. 763, 758, Defendants' Exh. A.) The court credits this testimony.

Satinder testified that he was not an employer of Vidtape and that he only worked there on commission as its salesman. He stated he never fired employees, never set work hours or work schedules, never directed or supervised employees, and never dealt with payroll issues. (T. 721-726.) The court does not credit this testimony by Satinder. It is undisputed that Satinder is the current president and employer of Inventive,

the portion of the enterprise that manufactures the videotapes and employs the majority of the minimum wage employees.

3. Arjan Singh Anand

Arjan, the father of Mohinder and Satinder, has never been a shareholder, corporate officer, or employee of Vidtape. (T. 713, 715.) He testified that he never gave orders, hired, fired, or set policies for employees. (T. 713-714, 717.) Arjan did visit his sons at work during the midday and discussed financial matters with them at lunch. (T. 713, 719.) Hardeep Anand testified that Arjan brought lunch for his sons a few days a week and that during the time he was at the office, he read a religious book. (T. 652.) The court credits this testimony.

Vidtape employees testified that they viewed Arjan as a "boss." (T. 270, 149, 288, 309, 333, 398, 477.) This testimony is credited. Occasionally, Arjan directed employees as to their jobs and gave them videotapes to be duplicated. (T. 50, 309, 333, 404, 437, 454-455.) This testimony is not credited.

Arjan is currently employed part-time as Inventive's general manager, where he maintains Inventive's inventory and procures spare parts. (T.716.)

B. Enterprise

Vidtape manufactured videotapes at its factory in West Babylon. Inventive was formed on June 18, 1997, days after the Department of Labor commenced its formal investigation

of Vidtape. Inventive began manufacturing videotapes on April 30, 1998, one day before the Department of Labor filed its complaint in this action. (Defendants' Exh. G.)

Vidtape sold its manufacturing operations to Inventive for $ 175,000. (T. 729, Defendants' Exh. L.) The book value of the assets was $ 120,000. (T. 785.) To pay for this, Inventive assumed Vidtape's $ 175,000 Keybank corporate bank loan. (T. 782-786, 878, Defendants' Exh. L, P-T.) Mohinder and Vidtape are guarantors of this loan. (T. 756, Defendants' Exh. P-T.) The asset sale agreement did not include warranties of merchantability or fitness. (T. 752, Defendants' Exh. L.)

Vidtape is Inventive's primary customer, with approximately 90% of Inventive's product marketed by Vidtape under Vidtape's label. (T. 613, Defendants' Exh. M.) Vidtape sales are over $ 500,000 annually and Vidtape and Inventive ship their product in interstate commerce. (*See* Letter of Jerold Wolin dated Oct. 29, 2001; T. 571-572, 615; Plaintiffs Exh. 12.)

When Inventive began its manufacturing operations, Vidtape employees resigned and were hired as Inventive employees. They signed a waiver stating:

> I [name], of [address] hereby acknowledge that I am resigning as an employee of Vidtape, Inc. as of April 30, 1998. I further acknowledge that during the course of my employment with Vidtape, Inc. I have had no claims for past due wages, or anything else. My

> period of employment with Vidtape, Inc. has been satisfactory.
>
> This acknowledgment is being signed by me voluntarily and of my own free will. There has been no pressure exerted upon me by anyone to sign this document. The contents of this document have been translated for me in [language], which is my native language.

(Defendants' Exh. G.) Employees observed no change between employment at Vidtape and employment at Inventive, other than a different corporate name on their pay check. (T. 367-368, 397.) The court credits this testimony.

D. Knowledge of Fair Labor Standards Act

Since the early 1990s, Mohinder had knowledge of minimum wage and overtime laws. (T. 590, 609-610.) Specifically, he knew that employers must pay employees one and a half times their hourly rate when they worked over forty hours per week, that the minimum wage was $5.15 at the time of his deposition, and that the law required employers to keep time cards. (T. 589-590, 609-610.) Vidtape posted a Department of Labor poster in the lunchroom. (T. 587.) The court credits this testimony.

Employees testified that after the Department of Labor commenced its investigation, Mohinder held a meeting where he instructed Vidtape employees to tell investigators that their work schedule was 8:30 a.m - 5:00 p.m., Monday - Friday. He also instructed employees to tell investigators that they

were paid the proper minimum wage of $ 4.25 per hour and that they received overtime wages at a rate of one and one-half their regular rate. (T. 358-359, 406.) The court credits this testimony of employees and does not credit the conflicting testimony of Mohinder.

E. Vidtape's Record-Keeping Practices

Prior to June 10, 1997, Vidtape did not maintain proper records as required by the F.L.S.A. Employees recorded their hours using time cards when they arrived in the morning and when they left at the end of the day. Hardeep Anand, Vidtape's bookkeeper, testified that Vidtape maintained these time cards for approximately two weeks after it issued employee paychecks. If no corrections to employee wages were necessary, she discarded the time cards. (T. 574.) The latter testimony is not credited. Mohinder directed her to discard the time cards. (T. 780-781.) After June 10, 1997, the date the Department of Labor began its formal investigation, Vidtape began preserving its time cards. (T. 781-782.)

Vidtape's payroll records for 1995, 1996, and part of 1997 show that Vidtape employees received two pay checks per month. (*See* Plaintiff's Exh. 2, 3, 4.) Vidtape's two pay periods during this time were the first to fifteenth day of the month, and the sixteenth to last day of the month. (*See id.*; T. 586, 796-797.) Vidtape's payroll records for this period did not contain the employees' hourly rates, number of hours worked per day, the number of hours worked per week, or the number of hours worked for each bi-monthly pay period. (*See* Plaintiff's Exh. 2, 3, 4, T. 880-881.) No other records

containing this information were maintained or preserved by Vidtape. (T. 573.)

Vidtape paid most employees by check. On pay day, employees received a pay check, but no pay stub or other information that indicated the hourly rate, hours worked, gross pay, or amount of deductions taken[1] (T. 20-21, 46, 81-82, 144, 210, 240, 286, 307, 408, 575-576, 689.)

F. Testimony of Plaintiff's Witnesses

At trial, twenty-one former Vidtape employees testified for the Secretary as to the hours they worked and the pay they received. These employees testified in English, Spanish, and Punjabi.

1. Work Schedule

The employees testified that they typically worked from 8:30 a.m. to 7:00 p.m., Monday through Saturday. (T. 21, 47, 62-63, 79, 109-110, 145-146, 210-211,237-239, 249-251,265, 283,306-307, 318-319, 330-331,347-348, 352, 400, 431,452, 472.) They took thirty minute lunch breaks and had one or two short breaks as well. (T. 63, 145, 210-211,238, 266, 352, 400.) Some employees also worked on Sundays.

---

[1] Three plaintiff witnesses, however, testified to cash payments in whole or in part. Muhammed Kashif testified that he and his friend "Omer" were paid $ 3.50 per hour in cash, "off the books." (T. 35, 46.) Two others stated that after working forty hours, the additional hours were paid in cash at $ 3.50 per hour. (T. 382, 435.)

(T. 110, 147, 211,282, 308, 330, 335, 353,401,431, 452, 473.) This consistent testimony indicates that employees worked an average of sixty hours per week and the court credits this testimony offered by the Secretary.

Many of the employees traveled together to and from work on the Long Island Railroad. Vidtape transported its employees to and from the train station in a company van. (T. 331-332, 347-349, 401,772-773.) The court credits this testimony.

2. Hourly Wage and Overtime

The employees testified that their wage was $ 4.00 per hour, and $ 3.50 per hour after taxes. (T. 19-20, 78, 98, 433.) Some employees testified that Vidtape never told them what wage the company paid its employees. (T. 143,217, 245, 264.) Beginning about June 10, 1997, immediately following the commencement of the Department of Labor investigation by a visit to the defendants' premises, employees received wages of $ 4.75 per hour, which was the statutory minimum wage at that time. The employees also testified that they did not receive overtime pay prior to June 10, 1997. (T. 65, 67, 79, 99.)[2] The court credits this testimony.

---

[2] Akhtar Majeed Khan testified that he received an hourly rate of $ 8.00 per hour for all hours he worked. (T. 65, 62, 67.) He worked as a "production controller/maintenance" worker. (T. 61.) His duties included maintaining and repairing the video loading machines, preparing paperwork for shipping, and supervising the warehouse in the absence of Malkit Singh. He did not perform tasks such as duplication or packaging of videotapes. (T. 68.) This

3. Reconstruction of the Employees' Back Wages

John Bialt Jr. analyzed Vidtape's payroll records and testified about the back wage computations he performed for each employee. Because no records of hours worked, hourly wage or overtime compensation existed, Bialt reconstructed estimates of this information based on the gross pay, as stated in Vidtape's payroll records. (T. 490.)

Bialt divided the gross pay by the $ 4.00 per hour wage figure to calculate an estimated number of hours worked per fifteen day pay period. Then he recalculated the number of weeks worked[3] and the average number of hours worked per week. Once Bialt calculated the average number of hours worked per week, he calculated the minimum wage deficiency and overtime deficiency owed to each employee. (T. 494-503.) (*See* Plaintiff's Exh. 21a.)

On cross examination, Bialt admitted that in some circumstances, his average hours calculations were higher than the witnesses' testimony of working sixty hours per week. Bialt also stated that although time cards were available

---

employee therefore is not entitled to any minimum wage back pay award, although he is entitled to a back pay overtime award. (*See* Exh. A annexed hereto, at 2.)

[3] Bialt used the following formula:

(Number of Vidtape pay periods the employee worked) ÷ (24 Vidtape pay periods per year) X (52 weeks per year) = Estimated number of weeks Vidtape employee worked.

after June 10, 1997, he did not examine them in preparing his wage calculations. (T. 545,547, 552.)

Because Plaintiff's Exhibit 21a, which was prepared prior to commencement of the trial, did not conform to the evidence adduced by the Secretary at trial, the Secretary submitted revised wage calculations prior to the close of trial but following the general admission of evidence. (*See* Plaintiff's Revised Exh. 21 a.) This exhibit reflects the testimony of the Secretary's witnesses at trial. The revised calculations exclude additional wages for Sunday, since the testimony at trial revealed that Sunday hours were included in the bi-monthly paychecks. These calculations also reflect the stipulation that Vidtape began paying its employees minimum wage beginning with the June 16 - June 30 pay period. The Secretary also submitted a revised summary chart. (*See* Revised Exh. 22a.) The court has not relied on any summary chart submitted by the Secretary prior to summations.

5. Child Labor

Wilber Amaya testified that he was fourteen years old when Vidtape hired him to pack videos and move boxes using a "hand truck." (T. 77, 809-810.) At his interview, he presented his INS work permit to Mohinder and Hardeep Anand, which indicated that Amaya was born on September 2, 1982. (T. 88-89, 76, 101-102, Plaintiff's Exh. 23.) Amaya worked ten hour days, six days a week, during the months when school was in session. (T. 79-80, 90, Plaintiff's Exh. 4.) Vidtape terminated Amaya after the Department of Labor began its investigation. (T. 87.) The court credits this testimony.

G. Testimony of Defense Witnesses

1. Hardeep Anand

Hardeep Anand, the aunt of Mohinder and Satinder, testified that she worked as Vidtape's bookkeeper and secretary. She calculated the payroll every two weeks. (T. 646-647.) She stated that she used the minimum wage figures of $ 4.25, $ 4.75 and $ 5.15 to calculate the payroll. (T. 648-649.) She also testified that she calculated overtime wages for the employees. (T. 649.) The court does not credit this testimony.

On cross-examination, Hardeep was not able to calculate the gross wage that she had written in the payroll records. She stated that she needed the time cards to perform this function. (T. 666-667.)

2. Delia Alvarado

Delia Alvarado who is presently employed by Inventive, testified that when she was hired in June, 1995 she earned $ 4.25 per hour. (T. 681, 682.) She stated her hours were Monday - Friday, 8:30 a.m. to 7:00 p.m. (T. 683.) She also testified that when she received her pay check, she reviewed the amount to be sure she was paid the proper wage and overtime. (T. 684.) The court does not credit this testimony.

3. Pridam Singh

Pridam Singh, a current Inventive employee, testified that he started working for Vidtape in 1997. (T. 696, 703.) He

stated that he earned $ 4.75 per hour. When he began work, his hours were 8:30 a.m. to 7:00 p.m. Monday through Friday, but a few months later his hours were reduced to 8:30 a.m. to 5:00 p.m. (T. 697.) The court does not credit this testimony.

4. Sunder Shahani

Sunder Shahani, a current Inventive employee, testified that he earned $ 5.75 per hour when he was hired June 2, 1997 to work at Vidtape. He stated his hours were 8:30 a.m. to 5:00 p.m. Monday through Friday and that he received overtime pay for any additional hours worked. (T. 705.) Shahani also testified that his paychecks contained details as to deductions taken, including his first paycheck of June 18, 1997. The court does not credit this testimony. When shown this check on cross examination, he admitted that no such deductions were shown.

5. Arjan Singh Anand

Arjan testified that he was not employed by Vidtape and that he never hired, fired, set wages, set hours, or set policies for employees. (T. 714, 717.) He was present at the factory between 10:00 am and 2:00 pm during the week, but stated he was not involved in business discussions. (T. 718.) The court credits this testimony.

6. Satinder Singh Anand

Satinder testified that he worked on commission for Vidtape as a salesman. (T. 722, 724.) He stated he never

hired or fired any employees, and rarely gave instructions to employees regarding production. (T. 725-726.) The court does not credit this testimony.

7. Mohinder Singh Anand

Mohinder testified as to the history of Vidtape since its incorporation in 1988. (T. 764-769.) He sold the manufacturing aspect of his business so that he could concentrate on sales. (T. 783.)

Mohinder stated employees were always informed of their wage rates, they worked Monday to Friday, 8:30 a.m. to 7:00 p.m., and they received overtime pay. (T. 777, 811.) He testified that the policies he set were in compliance with the F.L.S.A. (T. 590, 609-610.) He also testified that he directed Hardeep Anand to dispose of the time cards. (T. 781.) The court does not credit this testimony.

He stated that Malkit Singh managed the warehouse until January 1997, when Dilbag Singh and Pridam Singh replaced him. (T. 772.) According to Mohinder, Malkit drove employees to and from the train station, and then instructed employees as to which department they should work. (T. 772-773.) During the day, he made sales calls, but returned to drive employees to the train station and lock the factory. (T. 773.) Angus Gayle supervised the production area. (T. 772.) The court does not credit this testimony.

To rebut the calculations prepared by the Secretary, Mohinder prepared his own calculations. (*See* Defendants' Exh. X, Y.) For the period of June 1, 1997 to June 15, 1997,

he made his calculations based on the preserved employee time cards and on his assertions regarding the employees' wages and work schedule. (T. 849.) For the period of May 1, 1995 to June 1, 1997, when the time cards were destroyed, Mohinder reviewed the payroll records, employee pay checks, and used a calendar to calculate the proper seven day work week. Based on his assertions as to the employees' work schedule as ten hour days, five days a week, along with his assertion that the employees were paid the proper minimum wage and overtime, he calculated the amount of pay that each employee received per week. He stated that the gross amount reported in the ledger was the same amount as his calculations, and concluded that under his version of the calculations, the employees were paid properly, and no back wages were owed. (T. 856-867.) The court does not credit Defendants' Exh. X or Y or the corresponding testimony of Mohinder.

On cross examination, rounding of calculations and mathematical errors in calculations in the chart were highlighted, indicating that Mohinder's calculation of the total pay did not match the gross wages that the employees received. (T. 897-898, 899.)

CONCLUSIONS OF LAW

A. Introduction

At the outset, the court in assessing the credibility of the witnesses, finds the testimony of plaintiffs employee witnesses were credible. These employees testified in English, Spanish, Urdu and Punjabi. The testimony spanned over the entire

period of the Secretary's investigation, and many of the witnesses had never met, and were unable to communicate with each other. Nonetheless, all stated the same information as to wages and hours. The court does not find the testimony of the defense witnesses to be credible.

B. Employer

Defendants Mohinder and Satinder, but not Arjan, were employers under the Act. "Employer" is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d); *see also Herman v. RSR Sec. Svcs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999) (noting that "employer" should be interpreted expansively.) Factors examined under the Second Circuit's economic reality test in determining whether an individual is an employer include: (1) whether the alleged employer had the power to hire and fire employees; (2) whether he or she supervised and controlled employee work schedules or conditions of employment; (3) whether he or she determined the rate and method of payment; and (4) whether he or she maintained employment records. *See RSR Sec. Svcs.*, 172 F.3d at 139. Since this is a "totality of the circumstances test," any relevant evidence can be examined, and not all factors are required to be present. *See id.*

1. Mohinder Singh Anand

Mohinder was the primary employer at Vidtape. He was the president and sole shareholder of Vidtape (T. 764, 651), he had the power to hire, fire and supervise the employees, he set the work schedule of 8:30 a.m. to 7 p.m. (T. 777, 725),

and he determined the rate of pay for the employees. (T. 45.) He delegated the authority to his bookkeeper to calculate the wages, but he knew how to calculate them himself (T. 649). He also directed his bookkeeper to dispose of the employment records. (T. 781.)

2. Satinder Singh Anand

Satinder, Mohinder's brother, was also an employer under the Act. Employee witnesses for the Secretary stated that Satinder hired them (T. 208, 318, 774, Plaintiffs Exh. 13, Kumar dep. at 14), they reported to him when Mohinder was not available, and he sometimes directed them to work on the weekend. (T. 62, 315.) Satinder had authority to sign checks for Vidtape, and did so on numerous occasions. (T. 763, Defendants' Exh. A.) He also prioritized work for employees and instructed employees as to aspects of their job. (T. 606, 348-349, 726, Kumar dep. at 14, 27-28.) Further, after Inventive purchased the manufacturing portion of Vidtape, Satinder became the president and employer for those who previously worked at Vidtape.

3. Arjan Singh Anand

Arjan, the father, does not meet the definition of employer under the F.L.S.A. and the economic reality test. He was never an owner, shareholder, or officer of Vidtape. (T. 712-13.) He never received a paycheck from Vidtape, and he stated he never gave orders, hired, fired, or set policies for the employees. (T. 713.) The court credits this testimony. Employees did see him at the factory during mid morning and early afternoon in the office, and most thought he was a

"boss" when asked, (T. 270, 149, 288, 309, 333,398, 477), but this testimony is insufficient to support a definition of employer under the economic realities test. Although he occasionally gave the employees orders or directions and did attend some employee meetings, (T. 333, 62), he did not hold an integral role in Vidtape's operations, or in setting work policies, schedules or conditions of employment.[4]

C. Enterprise

Vidtape and Inventive are an "enterprise" under the Act. All employees of the enterprise are therefore covered by the Act, regardless of whether or not they work in the division or corporation that has committed the violations. The Act defines enterprise as "the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units." 29 U.S.C. § 203(s)(1)(A); *see also Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512, 517, 93 S.Ct. 1138, 1141 (1973) (stating the three elements a court should examine in determining whether an enterprise exists are related activity, uniform operations or common control, and common business purpose).

---

[4] With regard to the injunction of future violations against Inventive, Arjan is an employer. He is Inventive's general manager (T. 716), and he is also the fiduciary of the trust that holds 100% of Inventive's stock. (T. 713.)

1. Related Activity

Vidtape and Inventive were a unified operation. After the sale of Vidtape's assets to Inventive, the two remained integrally related to each other and their business activities were intertwined. Vidtape's sole provider of videotapes was Inventive. *(See* Requirement Contract, Defendants' Exh. 613.) Vidtape concentrated solely on sales of Inventive's product. (T. 719.) Ninety percent of Inventive's sales were to Vidtape. (T. 613.) The two corporations share the same office and warehouse space. (T. 734.) Additionally, employees who worked for Vidtape testified that when they commenced employment with Inventive, there was no change in their employment situation other than a different corporate name on their employment checks. (T. 367-368, 397.)

The sale of Vidtape's assets was not an arms length transaction. The purchase price was exactly equal to the outstanding loans on the assets of the corporation. (T. 728.) Typical warranties of fitness and merchantability were not given for this transaction. (T. 752.) Mohinder and Vidtape personally guaranteed the loan transaction. (T. 756, Defendants' Exh. P.) Further, the sale of Vidtape's assets and the corporate restructuring raise issues as to a legitimate business purpose, especially since the manufacturing operations under the Inventive corporate name began one day before the Secretary commenced this action. (T. 761.)

2. Common Control

Although the shareholders, officers and directors of the two corporations are not the same people, the common

control element remains. The enterprise is a family business. Satinder was an employer at Vidtape and is an employer at Inventive. Mohinder and Vidtape guaranteed Inventive's corporate loan for the manufacturing assets. Additionally, Mohinder's wife and children are beneficiaries of the Nihang Nivas trust which owns 100% of Inventive's stock. For these reasons, Mohinder and Satinder's common control of the enterprise is apparent.

3. Engaged in Commerce

Defendants do not dispute that Vidtape and Inventive were engaged in commerce during the period of the Secretary's investigation. An enterprise is "engaged in commerce or in the production of goods in commerce" if employees are engaged in the production of goods for commerce and the enterprise has an "annual gross volume of sales... not less than $ 500,000." 29 U.S.C. § 203(s)(1)(A). Defendants admitted in their amended answer that the enterprise (Vidtape and Inventive) had over $ 500,000 in annual sales at all relevant times encompassed by the amended complaint. (*See* Amended Answer at ¶ 9, see also Amended Complaint at XI.) The Secretary at trial adequately proved that the enterprise engaged in commerce.

D. Record-Keeping Violations

Defendants violated the Act's record-keeping provisions. Under § 211(c), "every employer subject to... this Act... shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him,

and shall preserve such records for such periods of time." 29 U.S.C. § 211 (c). The court has reviewed the defendants' payroll records (the only records in existence) for the period of July 3, 1995 to September 30, 1997. (*See* Plaintiff's Exh. 2-4.) The records state the employee's name, address, the fifteen day period for which the employee was paid, the date paid, the check number, the gross wage, deductions for social security, disability, federal tax, New York tax, and the employee's net pay. These records do not, however, indicate the sex and occupation of the employee (*see* 29 C.F.R. 516.2(a)(4)), the time of day and day of week in which the work week begins (*see* 29 C.F.R. 516.2(a)(5)), the regular hourly rate of pay for any work week (*see* 29 C.F.R. 516.2(a)(6)), the hours worked each workday and total hours worked each work week (*see* 29 C.F.R. 516.2(a)(7)), the total daily or weekly straight-time earnings or wages due (*see* 29 C.F.R. 516.2(a)(8)), or the total premium pay for overtime hours (*see* 29 C.F.R. 516.2(a)(9)).

Additionally, employees testified that they never received a pay stub or a calculation of their wages or hourly rates when they received their pay checks. Vidtape did not establish a 7-day, 168-hour established "work week". *See* 29 C.F.R. 516.2. Payroll records indicate that instead of establishing a work week, the employees were paid twice a month, on approximately a fifteen day pay period.

For the period of May 1, 1995 to June 1, 1997, defendants also violated the provision requiring the preservation of time cards. *See* 29 C.F.R. 516.6(a)(1). Trial testimony established that Mohinder directed bookkeeper

Hardeep Anand to dispose of the employees' time cards after she issued the employees' checks. (T. 781,574, 653.)

After June 1998, defendants used the computerized Paychex payroll system to maintain their records. (*See* Plaintiffs Exh. 6.) These records do not show the number of hours the employee worked in a week and they do not define the work week, in violation of 29 C.F.R. 516.2.

Additionally, some employees testified that they were paid cash. (T. 46, 382, 474, 433434.) No record of these payments has been preserved. These practices also violate § 211 of the Act.

E. Evidence Standard

When an employer fails to keep records in conformity with his statutory duty, the Supreme Court has set forth a burden shifting analysis for calculating the amount of uncompensated work.

> An employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The matter then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to

> the employee, even though the result be only approximate.

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-88, 66 S.Ct. 1187, 1192 (1946); *see also Reich v. Southern New England Telecom. Corp.*, 121 F.3d 58, 66-68 (2d Cir. 1997) (stating the Secretary's burden is to produce "sufficient evidence to establish that the employees have in fact performed work for which they were improperly compensated and produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference"). Testimony from a group of employee witnesses about the hours worked and pay received is sufficient representation to calculate the amount of wages owed to the enterprise's entire workforce. *See id.* (stating "the Secretary may present the testimony of a representative sample of employees as part of his proof of the prima facie case under the Act"). Since the defendants destroyed their employees' time cards and have no other records of the hours worked or wages paid to their employees, the burden shifting analysis set forth in *Mt. Clemens Pottery Co.*, is applicable.

1. The Secretary has met her burden

In this case, twenty-one witnesses testified for the Secretary as to the wages they earned and the hours they worked at Vidtape. This is sufficient to establish the working conditions for the entire sixty-seven employees for whom the Secretary has claimed wages. These witnesses stated that they worked 8:30 a.m. to 7 p.m., Mondays through Saturdays, and approximately two Sundays a month. Most stated that they received $ 4.00 per hour in wages (or $ 3.50 per hour after

taxes were taken out). They did not receive a premium wage for overtime hours.

2. Defendants have failed to produce precise evidence to negate plaintiffs inference

Defendants' evidence is not sufficient to negate the inferences drawn by the employee witnesses who testified for the Secretary. Defendants' witnesses and Mohinder's calculations did not establish the precise amount of hours worked before June 10, 1997. The court does not find the testimony of the defense witnesses (who stated they worked 8:30 a.m. to 7:00 p.m. Monday to Friday and received the proper statutory wages) to be credible in light of the overwhelming evidence presented by the Secretary. One defense witness was the aunt of Mohinder and Satinder, and others were current employees of Inventive. (T. 660, 681,695, 704.)

Defendants' Exhibit Y was also insufficient evidence of the precise amount of hours worked. These calculations, which were derived in a manner similar to Bialt's calculations, did not show the "precise amount of work performed." *Mt. Clemens Pottery Co.*, 328 U.S. at 687-88. They were also replete with mathematical errors and rounding in order to make it appear that the employees' gross wages correspond with the defense's testimony as to work schedule and wages. For these reasons, these calculations are insufficient to overcome the overwhelming evidence presented by the plaintiff.

Further, the waiver that Vidtape required its employees to sign before their resignation (*see* Defendants' Exh. G) is an insufficient defense to this action. The employees signed the waiver at the direction of Vidtape employers, and some employees testified that it was not translated into their native language. *See Tho Dinh Tran v. Alphonse Hotel Corp.*, 281 F.3d 23, 35 (2d Cir. 2002) (finding a waiver of all back wage claims that the plaintiff signed was an insufficient defense when the plaintiff was pressured to sign it, he did not understand the terms of the agreement, and the waiver was vague).

F. Minimum Wage Violations

Under § 206, the rate of pay per hour must be at least $ 4.25 (ending September 30, 1996), $ 4.75 (ending August 31, 1997), and $ 5.15 (currently). Minimum wage should be calculated on a work week basis, defined as a 7-day, 168 hour period. *See* 29 U.S.C. § 206.

The Secretary's witnesses testified that their gross wages before June 10, 1997[5] were $ 4.00 per hour. Since no accurate records or other evidence were produced by defendants to negate the credible testimony of these nineteen witnesses, under *Mt. Clemens Pottery Co.*, the court draws the reasonable inference that the defendants did violate the minimum wage provisions of the Act

---

[5] The parties stipulated that "no claims" would be pursued after June 16, 1997, the last pay period before the Department of Labor's Investigation. (T. 836, 843-845.)

G. Overtime Violations

Under § 207, no employees engaged in commerce shall work longer than forty hours per week unless the employee "receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half the regular rate at which he is employed." 29 U.S.C. § 207; *see also* 29 C.F.R. 778.109. Plaintiffs witnesses consistently testified that they did not receive overtime pay for the extra hours they worked. Since their average work week was between sixty to seventy hours, overtime compensation is owed to them.

H. Child Labor Violation

In employing Wilbur Amaya, defendants violated the Act's child labor provision. Section 212(c) of the Act provides that "no employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce." "Oppressive child labor" is defined as a "condition of employment under which... any employee under the age of sixteen years is employed by an employer... in any occupation." 29 U.S.C. § 203(1). Children between the age of 14 and 16 cannot be employed for more than three hours a day, 18 hours per week when school is in session, and 8 hours a day, 40 hours a week when school is not in session. Children may only work between 7 a.m. and 7 p.m. during school, and until 9p.m. in the summer. *See* 29 C.F.R. 570.35(a). The regulations also state that minors are not permitted to work in occupations that

involve manufacturing of goods. *See* 29 C.F.R. 570.33(a) - 570.33(e).

Wilber Amaya testified that he was hired by Mohinder. At his interview, Amaya presented Mohinder with his work card, which stated his date of birth was 1982. (*See* Plaintiff's Exh. 23.) Amaya worked at Vidtape in 1997 for approximately one year. He was fourteen years old when he began working. (T. 78.) He worked six days a week between the hours of 8:30 a.m. and 7:00 p.m. (T. 79.) He packed videos, used a lift, a hand cart, and machinery such as the video cassette machine. (T. 78, 88.) Vidtape terminated Amaya when the Department of Labor's investigation began. (T. 87.) Although Mohinder testified and defendants asserted as an affirmative defense that the minor child was hired at the request of a relative and that defendants were not aware they violated child labor law (T. 808, Answer ¶ 16), intent or wilfulness is not an element of this offense. *See* 29 U.S.C. § 212, 29 C.F.R. 570.

I. Hot Goods

The defendants violated the "hot goods" provision by manufacturing products in violation of the Act. The "hot goods" provision in § 215(a)(1) provides that it is unlawful for any person to "transport...ship...deliver or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed" in violation of minimum wage, overtime or child labor restrictions. 29 U.S.C. § 215(a)(1). The remedy for violation of this provision is an injunction (*see* § 217).

Vidtape violated the "hot goods" provision by manufacturing videotapes in violation of the Act and then shipping them in interstate commerce. An injunction is warranted.

J. Willful

The court finds that defendants acted willfully. The Supreme Court has defined employment practices as willful when "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by statute." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 108 S.Ct. 1677, 1681 (1988); *see also Reich v. Waldbaum, Inc.*, 52 F.3d 35, 39 (2d Cir. 1995) (stating "if an employer acts unreasonably but not recklessly...then its action should not be considered willful") (citations omitted). Mohinder and Satinder admitted that they had knowledge of the minimum wage and overtime laws. (T. 776, 855.) More than one witness indicated that before the Department of Labor interviewed employees, Mohinder had a meeting and told his employees to lie about their wages and hours worked. (T. 359, 406.) Further, a poster in the break room notified the employees of their rights under the Act. (T. 649.) For these reasons, a three year period for compensation of back wages beginning on May 1, 1995 is applicable. *See* 29 U.S.C. § 255(a).

K. Damages[6]

The Secretary seeks compensation for sixty-seven employees. The Secretary seeks the following amount of damages: $ 50,649.25 in minimum wage violations for the period of May 1, 1995 - June 10, 1997 and $ 70,716.30 in unpaid overtime wages for the period of May 1, 1995 October 5, 1997. (*See* Plaintiff's Summary Chart submitted after trial.) The Secretary also seeks liquidated damages in the amount of $ 121,365.55, for a total award of $ 242,731.10.

The Act's "Penalties" provision provides that employers who violate the minimum wage or overtime provisions shall be liable to the employees for unpaid wages, unpaid overtime, "and in an additional equal amount as liquidated damages." 29 U.S.C. § 206(b). Unless the employer shows "to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [Act]," liquidated damages should be awarded. 29 U.S.C. § 260.

The defendants destroyed all documentation related to hours worked or wages paid to their employees, such as time cards and pay stubs. In the absence of these records, the court finds the method used by the Secretary in calculating back wages owed to the employees to be reasonable. For the period of May 1, 1995 to June 10, 1997, the court finds that Vidtape

---

[6] All back wage claims against Inventive were dismissed at the end of the Secretary's case. (T. 642.)

paid its employees $ 4.00 per hour for all hours worked, and did not pay overtime. The employees worked approximately sixty hours per week. This is the default standard that the court will use in calculating damages. Aside from cash payments to Muhammed Kashif, all calculations are based on the gross pay as stated in the defendants' payroll records. Further, as stipulated by the parties, the court finds that after the Department of Labor initiated its investigation on June 10, 1997, Vidtape reduced its work schedule to 8:30 a.m. to 5:00 p.m. Monday to Friday and increased its wages to the statutory minium. (T. 836, 845.)

For these reasons, unless specifically discussed below, or due to a mathematical error by the Secretary, as noted by the court, the court awards back wages in the amount the Secretary has requested, and as set forth in Exhibit A.[7] Vidtape, Mohinder, and Satinder intentionally set these policies in deliberate violation of the Act. For this reason, liquidated damages will be awarded in an amount equal to the back wages that are owed.

1. Overtime claims after June 16, 1997

The Secretary has claimed overtime wages for various employees for the period of June 18, 1997 until October 5,

---

[7] Exhibit A annexed hereto is based solely on Plaintiff's Revised Exh. 21a, and not on Plaintiff's Exh. Revised Exh. 22a, or Plaintiff's summary chart submitted prior to summation, as the numbers for certain employees in Revised Exh. 22a and the summary chart do not correspond with those in Revised Exh. 21a. *See, e.g.* claims for Sarabjit Kaur, Hardeep Anand.

1997. The parties stipulated at trial that "no claims" would be pursued after June 16, 1997. (T. 836, 845.) Additionally, the Secretary's investigator, John Bialt, testified that in calculating this overtime, he did not examine the time cards, even though they had been preserved. (*See* Defendants' Exh. D.) The Secretary continues to base overtime claims after June 16, 1997 on Bialt's mathematical formula. For these reasons, plaintiffs claim for overtime wages after June 16, 1997 are denied.

2. Back wages for defense witnesses

The Secretary has claimed back wages for Hardeep Anand, Delia Alvarado, Pridam Singh and Sunder Shahani. These employees testified for the defense that they were paid the proper minimum and overtime wages. Indeed, in the Secretary's revised calculations, the claim for Hardeep Anand was calculated at the minimum wage that she testified to. The Secretary argues that these witnesses were untruthful, that they actually worked the same schedule as the other employees, and that they earned only $ 4.00 per hour.

The court finds itself in a quandary. Witnesses who testified untruthfully should not profit from their perjury. At the same time, if defendants are not directed to pay this claim, they will benefit from encouraging their employees to speak untruthfully. For these reasons, the court directs that all back wages owed to Hardeep Anand, Delia Alvarado, Pridam Singh and Sunder Shahani in the amount of $ 5389.75 be deposited with the Clerk of this Court who shall forthwith deposit such money with the Treasurer of the United States. *See* 28 U.S.C. § 2041.

3. Malkit Singh

The defendants specifically object to the minimum wage claim of $ 9890.40 and overtime claim of $ 4409.17 for Malkit Singh. They argue that he received a monthly salary of $ 719 and that he earned additional wages on sales calls and commissions. Section 203 provides an exemption to the minimum wage and overtime requirements for employees "employed in a bona fide executive, administrative, or professional capacity...or in the capacity of outside salesman." 29 U.S.C. § 203(a)(1).

Plaintiff's witnesses testified that Malkit supervised them during the day and that they saw him in the factory during the day. (T. 321-322, 402.) Mohinder testified that Malkit was present in the factory only when he drove employees to and from the train station, and when returned at night to lock the factory. During the rest of the day, Mohinder contended that Malkit worked as an outside salesman. The court does not credit Mohinder's testimony.

The defense's testimony of Malkit's duties did not adequately establish that he was an exempt employee under the regulations. There was insufficient evidence to establish that Malkit's primary duties consisted of management of the enterprise, that he directed the work of two or more employees, that he had the power to hire or fire employees, that he customarily and regularly exercised discretionary powers, and that at least twenty per cent of his time was allocated to supervisory duties. *See* 29 C.F.R. 541.1 (requiring all elements to be met for the employee to be exempt). Further, Mohinder's testimony regarding Malkit's

duties did not establish the requirements of an outside salesman, as no information was provided regarding whether Malkit obtained orders or contracts, or for what percentage of time Malkit was engaged in sales. *See* 29 C.F.R. 541.5. Based on the lack of evidence at trial, defendants have not sustained their burden of proving Malkit's status as an exempt worker, either as an "executive" or as an "outside salesman." *See Coming Glass Works v. Brennan*, 417 U.S. 188, 196-97, 94 S.Ct. 2223, 2229 (1974); *see also Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611,614 (2d Cir. 1991) (stating the employer "bears the burden of proving that its employees fall within an exempted category of the Act").

Defendants have failed to support their contention that the Secretary was required to present a representative supervisory witness to substantiate the claims made for Malkit is without merit. No law has been cited by defendants and the court's research has failed to uncover any support for this argument. The court finds it sufficient that various witnesses for the Secretary testified that they saw Malkit working during the day at the factory. Defendants have failed to establish that Malkit is an exempt employee. *See* 29 C.F.R. 541.1.

For these reasons, the court awards the minimum wage claim of $ 9890.40, and the overtime wage claim of $ 4409.17 for Malkit Singh.

4. Unexplained Wage Claims in Plaintiffs Exhibit 21a

The Secretary claims $ 1693.65 for Vijay Kumar. While $ 278.07 was calculated in a manner different from the typical formula used for the other employees, the transcript of the

witness admitted into evidence shows that this employee never received his final pay check, because he did not give Vidtape a month's notice before resigning. (Plaintiffs Post Trial Submission at ¶ 56; Plaintiffs Exh. 13, Kumar dep. at 35.) The defendants did not question Kumar about this statement. For this reason, the claim will be permitted.[8]

Further, the claim for Hardeep Anand in plaintiff's Revised Exh. 22a does not correlate to her claim in Revised Exhibit 21a. Since Exhibit 22a is a summary of the calculations performed, the court only relies on the calculations performed in Revised Exhibit 21a, which claims $ 1691.73 plus an additional unsubstantiated $ 394.61. For these reasons, the court awards $ 1691.73.

L. Prospective Injunction Against Future Violations

Pursuant to § 217, the Secretary is entitled to the equitable relief of an injunction restraining Vidtape, Inventive, Mohinder, Satinder and Arjan from future violations of the Act based upon the conclusion that they willfully violated the Act's minimum wage, overtime, record keeping, child labor and "hot goods" requirements. *See* Plaintiff's proposed conclusions of law ¶ 23.

An injunction against the enterprise is warranted in this case. Since the court finds that Inventive and Vidtape are an enterprise, even though back wage claims were dismissed

---

[8] This claim was included as a Minimum Wage Claim in Exhibit A.

against Inventive, an injunction is warranted against both corporations. An injunction is also warranted against Mohinder and Satinder, the two individual employers who set work policies in violation of the Act and against Arjan, who is the general manager of Inventive.

M. Judgment for Back Wages and Liquidated Damages

Defendants Mohinder Singh Anand, Satinder Singh Anand, Vidtape, and Inventive are jointly and severally liable for the back wages and liquidated damages totaling $ 239,707.16. *See Falk v. Brennan*, 414 U.S. 190 (1973), 29 C.F.R. 791.

The provisions of this order relative to back wage payments shall be deemed satisfied when defendants deliver to the Bank of America, U.S. Department of Labor, ESA, Wage and Hour Division, P.O. Box 845229 Dallas, TX 75284-5229 certified checks or bank checks or money orders made payable to each individual employee listed in Exhibit A and in the alternative "or Wage-Hour, Labor" (e.g. "Amar Singh Kaler or Wage-Hour, Labor") in the net amount due each said employee after making legal deductions from the gross amounts of back wages only and not from liquidated damages or pre-judgrnent interest listed opposite their names. Said payments shall be delivered no later thirty (30) days from the entry of this order.

Defendants shall make available to plaintiff the social security number and last known address of each employee Or former employee listed in Exhibit A. The Secretary shall

distribute the proceeds of such checks to the employees involved, or to their estates, if that is necessary.

Neither defendants nor any one on their behalf shall directly or indirectly solicit or accept the return or refusal of any sums paid as back wages and liquidated damages under this Judgment. Any sums which cannot be distributed to the employees named herein, or to their personal representatives because of inability to locate the proper persons or because of such persons' refusal to accept such sums, shall be deposited with the Clerk of this Court who shall forthwith deposit such money with the Treasurer of the United States pursuant to 28 U.S.C. §§ 2041 and 2042.

N. Interest

The court also awards prejudgment interest.

> The purposes of [29 U.S.C. § 217] are to make whole employees who have unlawfully been deprived of wages and to eliminate the competitive advantage enjoyed by employers who have illegally underpaid their workers .... Prejudgment interest obviously serve the compensatory purpose by making up for the delay in receiving the money, during which time the employees were denied its use, and by partially offsetting the reduction in the value of the delayed wages caused by inflation....The award of interest is especially appropriate for wage earners, who ordinarily do not have access to resources other than their wages to meet the necessities of daily living ....Pre-judgment interest also serves to remedy the

> competitive disadvantage inflicted on law-abiding businesses by denying the errant employer the free use of the money it should have paid out in wages. Failure to award interest would create an incentive to violate the F.L.S.A., because violators in effect would enjoy an interest-free loan for as long as they could delay paying out back wages....[I]t is ordinarily an abuse of discretion not to include pre-judgment interest in a back-pay award under the F.L.S.A..

Donovan v. Sovereign Sec., Ltd., 726 F.2d 55, 58 (2d Cir. 1984). Interest shall be pursuant to the adjusted prime rate prescribed by 26 U.S.C. § 6621 and will continue to accrue at the rate specified until all back wages and accrued interest are paid.

O. Costs

The Secretary, in paragraph XVIII(4) of her amended complaint, seeks an order awarding plaintiff the costs of this action. Plaintiff is hereby additionally awarded costs.

P. Penalties

The court awards an $ 11,000 civil penalty for the willful violation of the Act's child labor provision of § 212. (*See* § 216(e).)

JUDGMENT

A. INJUNCTION

I. ORDERED, ADJUDGED AND DECREED, that defendants Vidtape, Inc., Inventive Technology Systems, Inc, Mohinder Singh Anand, Satinder Singh Anand and Arian Singh Anand, their officers, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, or otherwise, be, and they hereby are, permanently enjoined and restrained from violating the provisions of §§ 6(a)(1), 7(a)(1), 11(c), 12(c), 15(a)(2), 15(a)(4), and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended, (52 Stat. 1060, 29 U.S.C.§§ 201-219, et seq.), hereinafter called the Act, in the following manners:

1. Defendants Vidtape, Inc., Inventive Technology Systems, Inc, Mohinder Singh Anand, Satinder Singh Anand and Arian Singh Anand shall not, contrary to § 6 of the Act, pay to any of their employees who in any work week are engaged in commerce or in the production of goods for commerce, or employed in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act, wages at rates less than those which are now, or which in the future may become, applicable under§ 6 of the Act.

2. Defendants Vidtape, Inc., Inventive Technology Systems, Inc, Mohinder Singh Anand, Satinder Singh Anand and Arjan Singh Anand shall not, contrary to § 7 of the Act, employ any of their employees in any work week who are

engaged in commerce or in the production of goods for commerce, or employed in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act, for work weeks longer than the hours now, or which in the future become, applicable under §§ 7 and 15(a)(2) of the Act, unless the said employees receive compensation for their employment in excess of the prescribed hours at rates not less than one and one-half times the employees' regular rates.

3. Defendants Vidtape, Inc., Inventive Technology Systems, Inc, Mohinder Singh Anand, Satinder Singh Anand and Arjan Singh Anand shall not, contrary to §§ 12(c) and 15(a)(4) of the Act, employ minors under the age of eighteen years in commerce or in the production of goods for commerce, or in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act, on jobs or during hours which constitute oppressive child labor as defined in § 3(1) of the Act and the Regulations issued pursuant thereto and found at 29 C.F.R. Part 570, Subpart C, § 570.35.

4. Defendants Vidtape, Inc., Inventive Technology Systems, Inc, Mohinder Singh Anand, Satinder Singh Anand and Arjan Singh Anand shall not fail to make, keep, and preserve adequate records of their employees and of the wages, hours, and other conditions and practices of employment maintained by them, as prescribed by the Regulations issued pursuant to §§ 11(c) and 12 of the Act and found at 29 C.F.R. Part 516 and 29 C.F.R. § 570.36.

B. BACK PAY AND LIQUIDATED DAMAGES

II. ORDERED, ADJUDGED AND DECREED that Defendants Vidtape, Inc., Inventive Technology Systems, Inc., Mohinder Singh Anand and Satinder Singh Anand shall not withhold the back wages due the employees and former employees listed on Exhibit A. Defendants Vidtape, Inc., Inventive Technology Systems, Inc., Mohinder Singh Anand and Satinder Singh Anand shall pay to plaintiffs representatives $ 119,853.58 in unpaid minimum wage and overtime compensation, $ 119,853.50 in liquidated damages, for a total amount of $ 239,707.58, plus prejudgment interest, in an amount to be determined. Interest is to be computed pursuant to the adjusted prime rate prescribed by 26 U.S.C. § 6621. Interest will continue to accrue at the rate specified until all back wages and accrued interest are paid. Interest is to be computed by the U.S. Department of Labor as soon as possible after receipt of the Court's decision in this case; and it is further

ORDERED that any monies due persons named in Exhibit A, annexed hereto and not so distributed by plaintiff within one (1) year, because of plaintiffs inability to locate the proper person or said persons' refusal to accept such money, shall be deposited with the Clerk of the Court who shall forthwith deposit such money with the Treasurer of the United States pursuant to 28 U.S.C.§ 2041; and it is further

ORDERED, that if payment is not tendered within such time, additional interest shall be due defendants' employees and former employees at the applicable adjusted prime rate, and it is further

C. PENALTIES

III. ORDERED, ADJUDGED AND DECREED that the Defendants Vidtape, Inc., Inventive Technology Systems, Inc., Mohinder Singh Anand and Satinder Singh Anand pay $ 11,000 in civil penalties, and it is further

D. COSTS

IV. ORDERED, ADJUDGED AND DECREED that the costs of this action shall be taxed by the Clerk against defendants Vidtape, Inc., Inventive Technology Systems, Inc., Mohinder Singh Anand and Satinder Singh Anand.

The clerk of the court is directed to enter judgment and mark this case as closed.

SO ORDERED.
Dated: Central Islip, New York
March 29, 2002

/s/_____
E. THOMAS BOYLE
United States Magistrate Judge

SEE FOLDOUT

EXHIBIT A

WAGE INFORMATION CHART

EXHIBIT A

Name	Minimum Wage Underpayment Claim	Overtime Under-payment Claim	Total Claim by Secretary	Minimum Wage Award by Court	Overtime Award by Court	Total Award by Court
Aguirre, L	12.69	0.00	12.69	12.69	0.00	12.69
Akhter, W	57.75	122.47	180.22	57.75	122.47	180.22
Akwal, P	2417.72	6037.46	8455.18	2417.72	6037.46	8455.18
Alfard, F	121.50	0.00	121.5	121.50	0.00	121.5
*Alvarado, D	1527.56	1582.77	3110.33	1527.56	1582.77	3110.33
Alvarez, M	1204.41	1137.90	2342.31	1204.41	1137.90	2342.31
Amaya, W	642.59	593.98	1236.57	642.59	593.98	1236.57
*Anand, H	0.00	2086.34	2086.34	0.00	1691.73	1691.73
Argueta, M	1187.25	1083.71	2270.96	1187.25	1083.71	2270.96
Benitez, O	115.25	109.50	224.75	115.25	109.50	224.75
Bonilla, C	24.50	24.08	48.58	24.50	24.08	48.58
Caceres, M	59.01	501.49	560.49	59.01	501.49	560.50
Campos, A	116.19	66.76	182.95	116.19	66.76	182.95
Catano, A	400.70	1011.54	1412.24	400.70	1011.54	1412.24
Chetal, M	238.69	371.28	609.97	238.69	371.28	609.97
Chhokar, R	162.38	459.27	621.64	162.38	459.27	621.65
Chhokar, S	167.44	502.31	669.75	167.44	502.31	669.75
Chodha, A	36.56	126.15	162.72	36.56	126.15	162.71
Clarosz, C	1020.21	554.57	1574.78	1020.21	554.57	1574.78
Cruz, J	89.38	0.00	89.38	89.38	0.00	89.38
Cruz, Re	27.75	51.70	79.45	27.75	51.70	79.45
Cruz, Ri	87.50	190.72	278.22	87.50	190.72	278.22
Escalante, J	108.63	0.00	108.63	108.63	0.00	108.63
Euseda, F	1741.06	2214.76	3955.82	1741.06	2161.14	3902.2
Flores, A	1129.81	1169.41	2299.22	1129.81	1122.89	2252.7

EXHIBIT A

Name	Minimum Wage Underpayment Claim	Overtime Under-payment Claim	Total Claim by Secretary	Minimum Wage Award by Court	Overtime Award by Court	Total Award by Court
Flores, J	58.50	0.00	58.5	58.50	0.00	58.5
Garcia, L	1599.31	1832.89	3432.21	1599.31	1832.89	3432.20
Gayle, A	0.00	167.96	167.96	0.00	167.96	167.96
Ghuman, A	288.75	447.53	736.28	288.75	296.86	585.61
Gomez, M	851.07	710.04	1561.10	851.07	710.04	1561.11
Gomez, S	1364.50	1104.15	2468.65	1364.50	1104.15	2468.65
Gonzalez, J	898.22	161.22	1059.44	898.22	161.22	1059.44
Gurmito	681.81	1221.92	1903.72	681.81	1221.92	1903.73
Hernandez, J	24.25	0.00	24.25	24.25	0.00	24.25
Ibarra, M	190.13	142.55	332.67	190.13	142.55	332.68
Jaico	230.71	855.82	1086.54	230.71	855.82	1086.53
Kaler, A	1192.40	1279.56	2471.96	1192.40	1279.56	2471.96
Kaler, B	1047.88	1130.33	2178.20	1047.88	1130.33	2178.21
Kashif, M	205.50	216.75	422.25	205.50	216.75	422.25
Kaur, J	148.56	157.74	306.3	148.56	157.74	306.3
Kaur, Ka	472.2	1803.91	2276.11	472.2	1803.91	2276.11
Kaur, Ku	300.88	618.26	919.13	300.88	618.26	919.14
Kaur, M	401.63	579.62	981.25	401.63	579.62	981.25
Kaur, Sa	800.98	3516.52	4317.5	800.98	3516.52	4317.5
Kaur, Suk	200.49	2696.94	2897.43	200.49	2696.94	2897.43
Kaur, Sur	1500.00	1731.42	3231.42	1500.00	1661.85	3161.85
Khan, A	0.00	749.32	749.32	0.00	749.32	749.32
Kumar, V	679.12	1014.53	1693.65	679.12	1014.53	1693.65
Kumari, R	1671.00	2850.33	4521.33	1671.00	2489.71	4160.71
Malhotra, D	2443.57	3888.92	6332.48	2443.57	3888.92	6332.49

Name	Minimum Wage Underpayment Claim	Overtime Under-payment Claim	Total Claim by Secretary	Minimum Wage Award by Court	Overtime Award by Court	Total Award by Court
Pereira, N	19.88	0.00	19.88	19.88	0.00	19.88
Rashid, M	503.81	360.31	864.12	503.81	360.31	864.12
Reyes, A	0.00	116.09	116.09	0.00	0.00	0.00
Reyes, O	81.38	51.66	133.03	81.38	51.66	133.04
Romero, T	2429.34	3817.13	6246.47	2429.34	3747.73	6177.07
Ruiz, P	935.81	699.06	1634.87	935.81	699.06	1634.87
Sanchez, V	1618.47	2578.20	4196.66	1618.47	2578.20	4196.67
Shah, B	454.56	483.45	938.01	454.56	410.12	864.68
*Shahni, S	0.00	120.21	120.21	0.00	0.00	0.00
Singh, A	2475.19	5209.93	7685.11	2475.19	5154.35	7629.54
Singh, B	259.13	544.90	804.03	259.13	544.90	804.03
Singh, G	777.31	765.26	1542.57	777.31	765.26	1542.57
Singh, H	321.00	884.68	1205.68	321.00	884.68	1205.68
Singh, Ka	502.40	1471.76	1974.16	502.40	1409.24	1911.64
Singh, Ku	233.75	0.00	233.75	233.75	0.00	233.75
Singh, M	9890.40	4409.17	14299.57	9890.40	4409.17	14299.57
*Singh, P	263.92	323.77	587.70	263.92	323.77	587.69
TOTAL	**50714.34**	**70711.98**	**121426.25**	**50714.34**	**69139.24**	**119853.58**

* Award to be deposited with Clerk of Court who shall forthwith deposit such money with the Treasurer of the United States.

APPENDIX D

STATUTORY PROVISIONS INVOLVED

FAIR LABOR STANDARDS

29 U.S.C. § 206

206. Minimum wage

Employees engaged in commerce; home workers in Pureto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees.

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or the production of goods for commerce, wages at te following rates:

(1) except as other wise provided in this section not less than $4.25 an hour during the period ending on September 30, 1996, not less than $4.75 an hour during the year beginning on October 1, 1996, and not less than $5.15 an hour beginning September 1, 1997;

***

29 U.S.C. § 207

§ 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as other wise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods fro commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 C.F.R. Part 541.1

§ 541.1 Executive.

The term *employee employed in a bona fide executive * * * capacity* in section 13(a) (1) of the Act shall mean any employee:

(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department of subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other

change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: *Provided*, That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $ 155 per week (or $ 130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: *Provided*, That an employee who is compensated on a salary basis at a rate of not less than $ 250 per week (or $ 200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

Supreme Court, U.S.
FILED
OCT 23 2003
CLERK

No. 03-317

In the Supreme Court of the United States

VIDTAPE, INC., ET AL., PETITIONERS

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HOWARD M. RADZELY
Acting Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Deputy Associate Solicitor

MICHAEL P. DOYLE
Attorney
Department of Labor
Washington, D.C. 20210

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the evidence supported the district court's finding that petitioner Satinder Singh Anand was an "employer" within the meaning of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 203(d).

2. Whether the evidence supported the district court's finding that Malkit Singh was a non-exempt employee and therefore entitled to back wages under the FLSA.

3. Whether the evidence supported the district court's finding that petitioners failed to pay their employees in accordance with the FLSA's minimum wage and overtime provisions.

4. Whether the evidence supported the district court's calculation of damages.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Anderson v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)	9
Goldberg v. *Whitaker House Coop., Inc.*, 366 U.S. 28 (1961)	5
Herman v. *RSR Sec. Servs., Ltd.*, 172 F.3d 132 (2d Cir. 1999)	5, 6
Icicle Seafoods, Inc. v. *Worthington*, 475 U.S. 709 (1986)	8
Reich v. *Southern New England Telecomm. Corp.*, 121 F.3d 58 (2d Cir. 1997)	7
United States v. *Johnston*, 268 U.S. 220 (1925)	6
Walling v. *General Indus. Co.*, 330 U.S. 545 (1947)	8, 9

Statute and regulation:

Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*	2
29 U.S.C. 213(a)(1)	4, 8
29 C.F.R. 541.1(f)	4, 8

In the Supreme Court of the United States

No. 03-317

VIDTAPE, INC., ET AL., PETITIONERS

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The summary order of the court of appeals (Pet. App. 1a-10a) is not published in the *Federal Reporter* but is reprinted in 66 Fed. Appx. 261. The district court's amended memorandum opinion (Pet. App. 11a-51a) is reported at 196 F. Supp. 2d 281.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2003. The petition for a writ of certiorari was filed on August 26, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Vidtape, Inc. (Vidtape), and Inventive Technology Systems, Inc. (Inventive), are engaged in

the business of manufacturing, duplicating and selling videocassettes. Pet. App. 13a. Petitioner Mohinder Singh Anand is Vidtape's president and sole shareholder. *Ibid.* Petitioner Satinder Singh Anand is Inventive's president, and petitioner Arjan Singh Anand is Inventive's general manager. *Id.* at 14a. On May 1, 1998, the Secretary of Labor (Secretary) filed this lawsuit alleging that petitioners violated the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, from May 1995 to June 1997 by (1) failing to pay their employees the minimum wage and overtime; (2) employing a child in violation of the FLSA's child labor provision; (3) failing to keep and maintain appropriate records; and (4) placing certain articles into the stream of commerce in violation of the FLSA's "hot goods" provision. Pet. App. 12a-13a. The Secretary sought back wages on behalf of 67 current and former employees, liquidated damages, and an injunction against future FLSA violations. *Id.* at 3a.

2. The United States District Court for the Eastern District of New York conducted a bench trial at which 21 former employees testified on the Secretary's behalf. Pet. App. 12a, 19a. Several testified that, during the relevant time period, they worked an average of 60 hours per week and were paid $4 per hour, without overtime. *Id.* at 20a-21a. In addition, because petitioners did not keep adequate payroll records, the Secretary introduced testimony from an expert who calculated the back wages owed to each employee based upon the assumption that they were paid $4 per hour. *Id.* at 21a. Petitioners countered with testimony of their own in an effort to prove that they complied with the FLSA's minimum wage and overtime provisions. *Id.* at 23a-27a.

The district court entered judgment for the Secretary. Pet. App. 11a-51a. The court found the Secretary's witnesses credible and found petitioners' witnesses not credible. *Id.* at 27a. Based on the testimony of the witnesses that the court found credible, the court concluded that all petitioners except Inventive and Arjan Singh Anand committed willful violations of the FLSA's minimum wage and overtime provisions. *Id.* at 36a-37a, 39a-40a. Inventive was not liable because it began operations after the time period covered by the wage claims; Arjan Singh Anand was not liable because he was not an "employer" during the relevant period. See *id.* at 12a, 16a, 27a, 29a, 40a n.6. In finding the minimum wage and overtime violations, the court rejected petitioner Satinder Singh Anand's contention that he too was not an "employer." Applying an "economic reality" test, the court found that Satinder Singh Anand qualified as an employer because he hired some employees, gave out work assignments, acted as a supervisor, and had authority to sign checks. *Id.* at 14a-15a, 27a-29a.[1]

Having found FLSA violations, the district court entered an injunction prohibiting petitioners from engaging in future violations of the FLSA and awarded the Secretary back wages and liquidated damages totaling $239,707.58 against Vidtape, Mohinder Singh Anand, and Satinder Singh Anand. Pet. App. 48a-50a. The money judgment included a back wage award for employee Malkit Singh, despite petitioners' claim that he fell within the FLSA's exemption for persons "em-

---

[1] The district court also ruled that petitioners violated the FLSA's child labor, record-keeping, and "hot goods" provisions. Pet. App. 32a-33a, 37a-39a. Petitioners have not sought review of those rulings.

ployed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. 213(a)(1). Whether an employee falls within that exemption is determined by applying a "long test" if he earns between $155 and $250 per week on a salary basis, or by applying a "short test" if he earns more than $250 per week on a salary basis. See 29 C.F.R. 541.1(f). The district court applied the "long test" to determine Malkit Singh's status and concluded that petitioners' evidence did not establish all of the requirements for the exemption. Pet. App. 43a-44a.[2]

3. In an unpublished summary order, the United States Court of Appeals for the Second Circuit affirmed the district court's judgment in relevant part. Pet. App. 1a-10a. The court of appeals rejected most of petitioners' contentions without discussion. *Id.* at 4a. The court explained that it had considered those arguments and found them to be "without merit." *Ibid.* The court's summary order did discuss petitioners' contention that Malkit Singh was exempt from the FLSA as an executive employee. *Id.* at 4a-8a. Like the district court, the court of appeals concluded that the "long test" governed Malkit Singh's status, because his wages, excluding those earned from sales calls and commissions, amounted to less than $250 per week. *Id.* at

---

[2] The district court mistakenly held Inventive jointly and severally liable for back wages, Pet. App. 46a, but the court of appeals vacated that aspect of the judgment based on the parties' stipulation, *id.* at 3a-4a. The district court subjected Inventive and Arjan Singh Anand to prospective injunctive relief notwithstanding its conclusion that they were not liable for back wages and liquidated damages because the court concluded that Vidtape and Inventive became an "enterprise" and Arjan Singh Anand became an "employer" after the time period covering the wage claims. *Id.* at 29a & n.4, 46a.

6a. The court of appeals then upheld the district court's finding that petitioners had not established all of the requirements for the exemption. *Ibid.* Finally, the court of appeals held that, even though Malkit Singh performed some supervisory duties, the evidence did not establish that his job "was sufficiently different from the employees working alongside him to make their testimony as to the conditions and hours of their employment inapplicable to him." *Id.* at 8a. Accordingly, the court concluded, the "testimony of those employees was sufficient to support an award of back-pay * * * with respect to Malkit Singh." *Ibid.*

ARGUMENT

The court of appeals' summary order is correct and does not conflict with any decision of this Court or any other court of appeals. The petition for a writ of certiorari raises only fact-bound challenges, the resolution of which would have no significance beyond this case. Accordingly, this Court's review is not warranted.

1. Petitioners first contend (Pet. 16-19) that the district court's finding that Satinder Singh Anand was an "employer" is "inconsistent" with *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28, 32-33 (1961), and *Herman* v. *RSR Security Services, Ltd.*, 172 F.3d 132, 139-141 (2d Cir. 1999). That contention is incorrect. The district court expressly applied *RSR Security Services*, which elaborates on the "economic reality" test endorsed by this Court in *Whitaker House* for determining whether an employment relationship exists under the FLSA. Pet. App. 27a-28a. Petitioners raise only a fact-bound challenge to the application of settled law, which does not warrant this Court's review.

The district court correctly applied the economic reality test of *RSR Security Services* to the facts of this case. See Pet. App. 27a-29a. Relevant factors under the test include considerations such as whether the alleged employer had the power to hire or fire employees, whether he supervised or controlled employee work schedules or conditions of employment, whether he determined the rate or method of payment, and whether he maintained employment records. See *id.* at 27a-28a (citing *RSR Sec. Servs.*, *supra*). As the district court explained, employee witnesses for the Secretary testified that Satinder Singh Anand hired employees, that they reported to him when Mohinder Singh Anand was not available, that he prioritized their work and set their schedules, and that he had authority to sign checks and did so on numerous occasions. *Id.* at 28a (citing to record). Based on the "totality of the circumstances," the district court reasonably concluded that Satinder Singh Anand was an employer. *Ibid.* (quoting *RSR Sec. Servs.*, 172 F.3d at 139). Moreover, petitioners' challenge to the district court's fact-finding implicates no important legal rule of general application and thus does not warrant further review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

2. Petitioners next contend (Pet. 19-24) that the Secretary was not entitled to an award of back wages for Malkit Singh. Here again, petitioners essentially challenge the district court's fact-finding rather than a broadly applicable legal ruling. Their challenge has two components, neither of which has merit.

a. Petitioners mistakenly contend (Pet. 19-23) that the Secretary did not produce sufficient evidence that Malkit Singh was underpaid in violation of the FLSA's

minimum wage and overtime provisions. Petitioners acknowledge that the Secretary may meet her burden of proof by presenting the "testimony of a representative sample of employees." Pet. 20 (quoting *Reich* v. *Southern New England Telecomm. Corp.*, 121 F.3d 58, 67 (2d Cir. 1997)). And petitioners do not dispute that, in this case, the Secretary introduced testimony regarding petitioners' wage and hour practices from a representative sample of 21 former employees. See Pet. App. 35a. But petitioners contend (Pet. 20-23) that those workers were not representative of Malkit Singh's job category. As the court of appeals explained, however, two of the employee witnesses "testified to the effect that Malkit Singh worked the same hours as they did at the factory." Pet. App. 8a. Their testimony, coupled with petitioners' failure to show that Malkit Singh's job "was sufficiently different from the employees working alongside him to make their testimony as to the conditions and hours of their employment inapplicable to him," *ibid.*, established that petitioners failed to pay Malkit Singh in accordance with the FLSA. There is thus no merit to petitioners' assertion that the Secretary failed to meet her burden of proof on that issue.[3]

b. Petitioners further argue (Pet. 23-24) that the courts below erred in applying the "long test," rather than the "short test," to determine whether Malkit Singh met the exemption for someone "employed in a

---

[3] Petitioners are also incorrect in suggesting that the court of appeals' decision is "inconsistent with" the Second Circuit's decision in *Southern New England Telecommunications Corp.* Pet. 19. The court of appeals expressly cited that case, see Pet. App. 8a, and, as discussed in the text above, explained why there was sufficient evidence from employees representative of Malkit Singh's job category.

bona fide executive, administrative or professional capacity." 29 U.S.C. 213(a)(1). That argument also lacks merit. As both the district court and the court of appeals determined, the "long test" applied to Malkit Singh because his salary-based income did not exceed $250 per week. Pet. App. 6a (citing 29 C.F.R. 541.1(f) and explaining that "only wages accrued 'on a salary basis,' count toward the calculation"); see *id.* at 43a-44a.

Petitioners bore the burden of proof on whether Malkit Singh falls within the exemption. See *Walling* v. *General Indus. Co.*, 330 U.S. 545, 547-548 (1947) (employer bears the burden of proving exemptions from the FLSA). The district court heard the relevant testimony and concluded that petitioners had failed to prove that each of the long test's requirements had been satisfied. See Pet. App. 43a-44. Not surprisingly, the court of appeals found no clear error in the district court's fact-finding. *Id.* at 6a; see *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 713 (1986) (clearly erroneous standard applies to the review of the "facts necessary to a proper determination of the legal question whether an exemption to the FLSA applies in a particular case"). That fact-bound determination does not warrant this Court's review.

3. Petitioners' third and fourth contentions (Pet. 24-30) are that the district court erred in finding minimum wage and overtime violations and in calculating damages. The district court's determinations were based upon the former employees' testimony that they worked an average of 60 hours per week, including occasional Sundays, at a rate of $4 per hour. See Pet. App. 35a-37a, 40a-41a. Petitioners insist that those witnesses' testimony was "replete with inconsistencies," Pet. 25, and was rebutted by the testimony of petitioners' witnesses, see Pet. 29. The district court, how-

ever, "was the proper judge of [the witnesses'] credibility," *Walling*, 330 U.S. at 550, and it found the former employees credible and petitioners' witnesses not credible. Pet. App. 20a-21a, 23a-24a, 26a-27a, 35a. In any event, the district court's fact-laden conclusions on liability and damages, affirmed without comment by the court of appeals, established no precedent for future cases and consequently do not warrant review by this Court.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

HOWARD M. RADZELY
Acting Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
NATHANIEL I. SPILLER
Deputy Associate Solicitor
MICHAEL P. DOYLE
Attorney
Department of Labor

OCTOBER 2003

---

[4] Petitioners also allege that the district court's findings on minimum wage and overtime violations and damages are "inconsistent" with "[d]ecisions of this Court and of [o]ther United States Courts of Appeal." Pet. 24, 26. Petitioners, however, cite no circuit court decisions in support of that claim, and the district court expressly (and correctly) applied the only case from this Court that petitioners cite—*Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). See Pet. App. 34a. There is therefore no "inconsistency" between the district court's ruling and either *Anderson* or the decision of any court of appeals.